TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1923

No. [redacted] 151

PIERCE OIL CORPORATION, APPELLANT,

vs.

ESTHER HOPKINS, COUNTY CLERK OF SEBASTIAN COUNTY, ARKANSAS; J. R. CHANDLER, COUNTY TREASURER, &c., AND SAM WOOD, PROSECUTING ATTORNEY OF TWELFTH JUDICIAL CIRCUIT OF ARKANSAS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED NOVEMBER 16, 1923.

(29,247)

(29,247)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 697.

PIERCE OIL CORPORATION, APPELLANT,

vs.

LUTHER HOPKINS, COUNTY CLERK OF SEBASTIAN COUNTY, ARKANSAS; J. R. CHANDLER, COUNTY TREASURER, &c., AND SAM WOOD, PROSECUTING ATTORNEY OF TWELFTH JUDICIAL CIRCUIT OF ARKANSAS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 20, 1922.

a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1922, of said Court, before the Honorable John E. Carland, Circuit Judge, and the Honorable Jacob Trieber and the Honorable Thomas C. Munger, District Judges.

Attest:

[Seal of the United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the thirtieth day of December, A. D. 1921, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the Western District of Arkansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Pierce Oil Corporation was Appellant, and Luther Hopkins, County Clerk of Sebastian County, Arkansas, et al., were Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (*Citation and Waiver of Service.*)

United States of America to Luther Hopkins, County Clerk of Sebastian County, Arkansas; J. R. Chandler, County Treasurer of Sebastian County, Arkansas; Sam Wood, Prosecuting Attorney for the Twelfth Judicial Circuit of Arkansas—Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal allowed and filed in the Clerk's office of the District Court of the United States for the Western District of Arkansas, wherein Pierce Oil Corporation is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Frank A. Youmans Judge of the District Court of the United States for the Western district of Arkansas, this 15th day of December in the year of our Lord one thousand nine hundred and twenty-one.

FRANK A. YOUMANS,
Judge United States District Court for the Western District of Arkansas.

2 Service of the within citation is hereby waived this 16th day of December, 1921.

LUTHER HOPKINS,
County Clerk of Sebastian County, Arkansas.
J. R. CHANDLER,
County Treasurer of Sebastian County, Arkansas.
SAM WOOD,
Prosecuting Attorney for the Twelfth Judicial Circuit of Arkansas,
By J. S. UTLEY,
Attorney-General,
By WM. T. HAMMOCK,
Assistant.

Endorsed: Field in the District Court on Dec. 17, 1921.

District Court of the United States, Western District of Arkansas, Fort Smith Division.

Equity. No. 365.

PIERCE OIL CORPORATION, Plaintiff,

vs.

LUTHER HOPKINS, County Clerk of Sebastian County, Arkansas; J. R. Chandler, County Treasurer of Sebastian County, Arkansas, and Sam Wood, Prosecuting Attorney for the Twelfth Judicial Circuit of Arkansas, Defendants.

RECORD OF PROCEEDINGS IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF ARKANSAS, FORT SMITH DIVISION, IN THE ABOVE ENTITLED CAUSE.

Amended Petition.

Filed in U. S. District Court October 25, 1921.

In the United States District Court for the Western District of Arkansas, Fort Smith Division.

No. 365. Equity.

PIERCE OIL CORPORATION, Plaintiff,

vs.

LUTHER HOPKINS, County Clerk of Sebastian County, Arkansas; J. R. Chandler, County Treasurer of Sebastian County, Arkansas, and Sam Wood, Prosecuting Attorney for the Twelfth Judicial Circuit of Arkansas, Defendants.

Comes now the plaintiff and informs the court that it is a corporation duly organized and existing under the laws of the State of
3 Virginia and a citizen of that State and authorized to do business in Arkansas; that all the above named defendants

reside in and are citizens of Sebastian County, Arkansas, and that Luther Hopkins is the duly elected qualified and acting County Clerk of Sebastian County, Arkansas, and that J. R. Chandler is the duly elected, qualified and acting County Treasurer of Sebastian County, Arkansas, and that Sam Wood is the duly elected, qualified and acting Prosecuting Attorney of the Twelfth Judicial Circuit of Arkansas, and that Sebastian County, Arkansas, is included in the said Twelfth Judicial Circuit of Arkansas, and that Sebastian County, Arkansas, is in the Western District of Arkansas and in the jurisdiction of this court.

Plaintiff further informs the court that there are seventy-five counties in the State of Arkansas, and that there is now a duly elected, qualified and acting County Clerk in each County and a duly elected, qualified and acting County Treasurer of each County, and that there are eighteen judicial circuits in the State of Arkansas, and that there is now a duly elected, qualified and acting Prosecuting Attorney in each of said judicial circuits in this State.

That the amount in controversy exceeds $3,000.00, exclusive of costs and interest.

Plaintiff further informs the court that it is engaged in the distribution and sale of the products of petroleum throughout the several states of the United States, including the State of Arkansas; that gasoline and kerosene are products of petroleum and that in the course of its business throughout the different counties of the State of Arkansas, including Sebastian County, it sells vast quantities of gasoline to the inhabitants of said counties and citizens of said State, towit, in the course of a year approximately 3,500,000 gallons of gasoline.

That 75% of the same is sold to purchasers who use the same in combustible type of engines used to propel vehicles over the public highways of the State of Arkansas.

That a tax of one cent a gallon on the amount of gasoline sold and purchased by those who use the same in combustible type of engines used to propel vehicles over the public highways of the State of Arkansas exceeds $25,000.00 per annum.

4 Plaintiff further informs the court that on March 29, 1921, the General Assembly of the State of Arkansas passed and put into effect an act known as "Act No. 606, an act to levy a tax upon gasoline used in the propelling of motor vehicles and for other purposes."

That it is provided in said act that any person, firm or corporation which shall sell gasoline or kerosene or other products to be used by the purchaser thereof in propelling motor vehicles using combustible type of engines over the highways of the State shall collect from such purchaser in addition to the usual purchase price charged therefor the sum of one cent per gallon for each gallon so sold.

That said act further provides that the seller of said gasoline or products under the circumstances hereinbefore named shall report the sale to the Clerk of the County wherein said sales are made and the amount of the tax at one cent per gallon due and owing, said tax to be collected by the seller and paid by the latter to the Treasurer of the County.

That said act further provides that if any person or corporation so selling said gasoline and other products used for propelling internal combustible engines on the highways of the State of Arkansas shall fail to collect said tax of one cent per gallon from the purchaser of said gasoline, he or it shall immediately become personally liable for the payment of said tax and shall be subject to a civil suit instituted on behalf of the State of Arkansas for the collection of the tax.

That said act further provides that any person who shall fail to collect said tax of one cent per gallon from the purchaser thereof and to account for the same as provided by said act shall be guilty of a misdemeanor and subject to criminal prosecution, and if convicted shall be punished by a fine of not less than $10.00 or more than $1,000.00, in addition to the amount found to be owing and due on said tax, which said amount shall be recovered in a civil action by the Prosecuting Attorney of the District in the name of the State of Arkansas.

Plaintiff further informs the court that there are thousands of persons in the State of Arkansas to whom it has sold gasoline and to whom it will in the future sell gasoline and who have used the same and who will use the same in internal combustible motors over the public highways of the State of Arkansas who have refused to pay said tax of one cent per gallon on said gasoline to plaintiff, and who continue to refuse to pay the same to plaintiff.

Plaintiff further informs the court that the above named defendants, and each of them and all other county clerks, county treasurers and prosecuting attorneys in the State of Arkansas are threatening and are about to institute a great number of civil actions against plaintiff for the collection of said tax of one cent per gallon which defendants contend that the plaintiff ought to have collected from said purchasers of said gasoline from plaintiff.

Plaintiff further informs the court that Sam Wood, the Prosecuting Attorney of the Twelfth Judicial Circuit of Arkansas, and all other prosecuting attorneys in the State of Arkansas are threatening and are about to institute criminal actions against this plaintiff for the alleged failure to collect and to pay the said tax of one cent per gallon.

Plaintiff further informs the court that the act is repugnant to and in violation of the Fourteenth Amendment of the Constitution of the United States and paragraph eight of Article II. of the Constitution of the State of Arkansas, in that it deprives the plaintiff of its property without due process of law, to wit: that without its consent and without just compensation said act makes plaintiff liable for the debts of another, and in that said act makes plaintiff subject to punishment by fine for the act of another committed without plaintiff's connivance, consent or participation, and in that said act deprives plaintiff of its property and appropriates the same for public use without just compensation, and in that said act deprives plaintiff of its property and appropriates it for the use and the

benefit of another private person or individual without just compensation.

Plaintiff further informs the court that said act is repugnant to and in violation of Paragraph 23, Article II. of the Constitution of the State of Arkansas, in that said act delegates to the plaintiff, which is not a subordinate political or municipal corporation of the State of Arkansas, the power to levy and collect a tax.

6 Plaintiff further informs the court that said act is repugnant to and in violation of Paragraph 16, Article V. of the Constitution of the State of Arkansas, in that said act levies an arbitrary tax upon property and not according to its value, and in that said tax so levied is not uniform and equal, to-wit, that it taxes all gasoline sold for use in combustible type of engines used on the public highways of the State of Arkansas and exempts all gasoline sold for any other purposes and that said act taxes a species of property higher than another species of property of equal value, in this, to-wit, that it taxes gasoline that is to be used in combustible type of engines driven over the public highways of the State of Arkansas and does not tax gasoline used for other purposes in combustible type of engines and otherwise.

Plaintiff further informs the court that said act is void for the following reasons, to-wit:

1. That it requires the seller of gasoline to collect a tax of one per cent per gallon on all gasoline sold to purchasers for the purpose of being used in internal combustible type of engines in motor vehicles to be used on the public highways of the State of Arkansas without providing any method or means by which the seller may determine when said gasoline is to be so used.

2. That it makes the seller of gasoline the collector of the tax and both civilly and criminally liable for the same without providing any method by which the seller of gasoline may enforce the collection of said tax.

Plaintiff further informs the court that it is without adequate remedy at law and unless it is protected by process of this court, it will be subjected to a multiplicity of suits and to the expenditure of large sums of money in defense of criminal prosecutions against it for alleged violation of said act.

Wherefore the premises being considered, plaintiff prays that there will issue out of and under the seal of this court its preliminary writ of injunction restraining the defendants, and each of them, together with all county clerks, county treasurers and prosecuting attorneys and their deputies, agents or employees from in anywise attempting to enforce the provisions of Act No. 606 of the acts of the Legislature of the State of Arkansas for the year 1921, by instituting civil

7 suits or criminal actions against the plaintiff under the terms of said act, and that upon a final hearing of this cause said injunction be made perpetual and that this court enter a decree declaring that said act is in violation of the provisions of

the Constitution of the United States and of the Constitution of the State of Arkansas and for all other proper relief.

POE, GANNAWAY & POE,
By SAM T. POE,
Attorneys for Plaintiff.

BOYLE & PRIEST,
H. S. PRIEST,
G. T. PRIEST,
Of Counsel.

(*Demurrer and Response to Petition.*)

Filed in U. S. District Court October 22, 1921.

(Caption Omitted.)

Come the defendants herein named by J. S. Utley, as Attorney General for the State of Arkansas, and by leave of the court enters a special demurrer and response to petition of plaintiff herein.

Respondents specially demur to the petition as a whole, and for cause say:

That on the face of the petition, it is disclosed that petitioner is not the real party interested as plaintiff, in that petitioner complains of unlaful tax laid by Act No. 606, approved by the General Assembly of Arkansas on March 3rd, 1921, and discloses on the face of his petition that the tax complained of is laid upon purchasers or consumers of the article taxed without alleging that the petitioner is a consumer or purchaser of the taxed article. And respondents pray dismissal for lack of necessary party as plaintiff.

Respondents specially demur to so much of plaintiff's petition as complains that said Act No. 606 is repugnant to and in violation of the Constitution of Arkansas; and for cause say:

Plaintiff's petition is an original proceeding in a forum of the United States to test the validity of a state law; and in so far as it complains of a violation of the Federal Constitution, this court has original jurisdiction. But in so far as petitioner complains of a violation of the Constitution of Arkansas, the original jurisdiction is in the State courts, with right of appeal to the United States Supreme Court; and respondents pray judgment herein.

8 In desire to facilitate a hearing herein, and without waiving their demurrer and motion to dismiss this cause, respondents make answer to plaintiff's petition as follows:

They admit that plaintiff is a corporation and is engaged in the sale and distribution of gasoline and petroleum throughout the United States, including the State of Arkansas and her several counties; and sells in the seventy-five counties of Arkansas, including Sebastian County, 3,500,000 or more gallons of gasoline as alleged. Respondents admit that 75% or more of such sales are to purchasers who consume same in combustible type engines used to propel vehicles on the public highways of the State of Arkansas

as alleged, that a tax of One cent per gallon on gasoline, so sold and used in Arkansas exceeds $25,000.00 per annum as alleged, and that the amount in controversy herein exceeds $3,000.00.

Respondents admit that they are duly elected, qualified and acting officers of the county of Sebastian and State of Arkansas, that there are seventy-five counties in Arkansas, with officers therein as alleged, that the General Assembly of Arkansas on March 3rd, 1921, enacted and put into effect an Act known as "Act No. 606, An Act To Levy A Tax Upon Gasoline Used In The Propelling Of Motor Vehicles And For Other Purposes"; and that said Act requires the vendor of gasoline in Arkansas to register with the county clerk, to collect from the purchaser one cent tax per gallon on gasoline so used on the highways, to report all such sales to the county clerk, and to pay over the tax so collected to the treasurer of the county where so sold, collected and reported. And that said Act provides that such tax may (be) recovered from the vendor of gasoline so sold and used, upon vendor's failure to collect, report and pay over as by the Act required—to be recovered in a civil action therefor; and imposes upon such vendor a penalty of not less than $10.00 nor more than $1,000.00 in addition to such tax upon failure of vendor to collect and report and pay over—to be recovered in a criminal action by the prosecuting attorney of the district in the name of the State of Arkansas.

Respondents admit that San Wood and other prosecuting attorneys in Arkansas are by said Act required to bring a civil and criminal action against petitioner upon his failure to collect, report and pay over the tax by the said Act levied. But respondents deny that petitioner is a proper party plaintiff, and deny that the Act
9 herein challenged lays any burden of taxation upon the property or business of the petitioner.

Respondents deny that said Act is repugnant to and in violation of the Fourteenth Amendment to the Constitution of the United States as alleged, or otherwise, And denies that said Act deprives plaintiff of his property without due process of law and that it holds plaintiff for the debts of another without his consent and subjects plaintiff to punishment by fine for the act of another committted without plaintiff's consent or participation, as alleged.

Without waiving their special demurrer herein, respondents deny that said Act is repugnant to and in violation of Section 8, Article 2 of the Constitution of Arkansas; and deny that said Act deprives plaintiff of property and subjects him to punishment in violation of said Constitution as alleged, or otherwise.

Respondents deny that said Act is repugnant to and in violation of Section 23 of Article 2 of the Constitution of Arkansas; and deny that said Act delegates to plaintiff the right or power to levy a tax, as alleged.

Respondents deny Act is repugnant to and in violation of Section 5 of Article 16 of the Constitution of Arkansas; and deny that said Act levies a tax upon property, deny that the tax so levied is not uniform and equal, and deny that the tax so levied unlawfully discriminates as alleged, or otherwise.

Respondents deny that said Act is void in requiring the vendor of gasoline to collect the tax of One cent per gallon sold to purchasers for use upon the highways as alleged; and deny that the vendor is without a method or means to enforce collection of such tax as alleged. And respondents deny that petitioner is without adequate remedy at law, unless protected by restraining order of this court as alleged.

For information of the court, respondents attach as exhibit "A" hereto a copy of said Act No. 606, duly certified to by Ira C. Hopper, as Secretary of State of Arkansas; and in further answer respondents aver:

That the Act complained of in Section One thereof, levies upon the consumers of gasoline used in propelling motor vehicles over the highways of the State a tax of One cent per gallon for gasoline so used; and that such tax so levied is a privilege tax laid for use of the highways of the State, and as such is laid upon all persons alike, who make such use of the highways.

That said Act, in Section 2 thereof, requires of all persons, firms and corporations, without any discrimination, engaged in the sale of gasoline and other products for use in propelling vehicles on the State's highways, to register as such vendor, and to file report of such sales with the county clerk of the county where such sales are made; and this requirement is only to make a discovery of vendors and consumers to the State's agents, is not a burdensome or unreasonable regulation of trade, and is a necessary and reasonable exercise of police regulation by the State.

That said Act, in Section- 2 and 3 thereof, requires the vendor to collect from the purchaser and consumer the tax so levied by the State, and pay over same to the treasurer of the county where sold, for use on the highways; and this requirement is one of convenience to the State, the consumer and the vendor, is a proper exercise of the State's police power, and is not a burdensome or unreasonable regulation for the privilege of selling and using gasoline on the highways of the State. That said Act in Section 4 thereof, requires all persons, firms and corporations without regard to location and without any discrimination, engaged in the wholesale distribution of products suitable for propelling motor vehicles on the State highways to file on the tenth day of each month with the clerk of the county, a duly verified statement showing amount of such sales to each retailer within the county for the preceding month; and this provision is only for the purpose of discovering to the law and the State's agents information necessary to enforcement of the law, is a legitimate use of the State's police power, and is not a burdensome or unreasonable regulation laid upon the wholesaler for the privilege of dispensing to retailers in Arkansas gasoline and similar products for use on the highways.

That said Act in Section 6 thereof, holds the vendor responsible for the collection of said tax from the consumer and lays upon such vendor the duty of reporting such sales and paying over the tax so received; and a failure in either or both such duties subjects the vendor to a civil action for the tax and to a criminal action for such

failure. But this provision is necessary to enforcement of the law, does not deprive such vendor of property without due process,
11 is a valid exercise of the State's police power, does not make the plaintiff as vendor liable for the tax or debt of another, as consumer, without vendor plaintiff's consent, neither does it subject plaintiff as vendor to punishment for act of consumer in refusing to pay the tax, because in making such sale the plaintiff, as vendor, consents to the terms of the Act or he connives with the purchasing consumer to escape the privilege tax so laid upon the consumer.

Respondents submit that said Act No. 606, here complained of, is a legitimate use of the State's taxing power for maintenance of her highways; and that the detail provisions of the Act for enforcement of its purposes are valid and legitimate exercise of the State's police power.

Wherefore, respondents pray alternatively in the following order:

First. Judgment upon their demurrer as to plaintiff's capacity to sue and for costs.

Second. Judgment upon their demurrer to so much of plaintiff's petition as complains of a violation of the State Constitution.

Third. Judgment upon their response, that plaintiff's petition be denied, respondents have their costs, and other proper relief.

J. S. UTLEY,
Attorney General of Arkansas,
By WM. T. HAMMOCK,
Ass't.

EXHIBIT "A" TO RESPONSE.

State of Arkansas,
Department of State.

Ira C. Hopper, Secretary of State, to all to whom these presents shall come, Greeting:

I, Ira C. Hopper, Secretary of State of the State of Arkansas, do hereby certify that the following and hereto attached instrument of writing is a true and perfect copy of Act Number 606, "An
12 Act to levy a tax upon gasoline used in the propelling of motor vehicles, and for other purposes," Approved: March 3, 1921, the original of which was filed for record in this office on the — day of ——, ——.

In testimony whereof, I have hereunto set my hand and affixed my official Seal Done at office in the City of Little Rock, this 12th day of October 1921.

[Seal of the Secretary of State, Arkansas.]

IRA C. HOPPER,
Secretary of State,
By B. S. HOFF,
Deputy.

Act No. 606.

"An Act to Levy a Tax Upon Gasoline Used in the Propelling of Motor Vehicles, and for Other Purposes."

Be it enacted by the general assembly of the State of Arkansas:

Section 1. That all persons, firms or corporations who shall sell gasoline, kerosene or other products to be used by the purchaser thereof in the propelling of motor vehicles using combustible type engines over the highways of this State shall collect from such purchaser, in addition to the usual charge therefor, the sum of one cent (1c.) per gallon for each gallon so sold.

Section 2. It shall be the duty of all persons, firms and corporations engaged in the sale of gasoline or other products to purchasers using such products in the propelling of motor vehicles to register with the county clerk of the county in which such persons, firms or corporations shall be engaged in business. On or before the tenth day of each month any person, firm or corporation who shall be engaged in the selling of gasoline, kerosene or other products, to be used in the propelling of motor vehicles using combustile type engines shall file with the county clerk of the county in which said person, firm or corporation is doing business, a complete and itemized statement, duly verified, showing the sales of such gasoline, kerosene or other products to purchasers using the same for
13 the propelling of motor vehicles for the calendar month preceding said statement, and said statement shall show the amount of tax due by said seller upon such sales. Immediately upon the filing of such statement such seller shall pay into the county treasury the amount of tax shown to be due by said statement.

Section 3. Any person, firm or corporation who shall sell any gasoline, kerosene or other product upon which the tax herein provided for shall be due and who shall fail to collect the same, shall be personally liable for the amount of such tax so uncollected. Any person, firm or corporation engaged in the sale of gasoline, kerosene or other products, or any part thereof, for the propelling of motor vehicles owned by them shall be required to pay to the treasurer of the county the sum of one — (1c.) per gallon for each gallon so used.

Section 4. It shall be the duty of all persons, firms or corporations engaged in the wholesale distribution of gasoline, kerosene, or other products suitable for use for the propelling of motor vehicles using combustible type engines to file with the county clerk of each county in which they shall make any sale on or before the tenth day of each month, a statement duly verified, showing the amount of gasoline, kerosene and other products suitable for use for the propelling of motor vehicles sold by them to each retailer with the county during the calendar month preceding such statement.

Section 5. It shall be the duty of the county treasurer to file with the county court of the county at each term thereof a complete statement showing the amount of money received by him under the terms and provisions of this Act. Said county court shall examine such statement and if he finds the same correct shall approve the same and shall order the county treasurer to credit one-half of said amount to the general road fund of the county, and he shall direct said treasurer to transmit the remaining fifty per cent thereof to the Treasurer of the State of Arkansas to the credit of the Highway Improvement Fund.

Section 6. Any person, firm or corporation engaged in the sale of gasoline, kerosene or other product suitable for the use in the propelling of motor vehicles using a combustible type engine who shall fail to file the statement herein required, or who shall fail to promptly account for all money due by them under the terms and provisions of this Act shall be guilty of a misdemeanor and upon conviction shall be fined in any sum of not less than ten dollars
14 nor more than one thousand dollars, and in addition thereto the amount so due by them shall be recovered by the prosecuting attorney for the district, in the name of the State of Arkansas by civil action.

Section 7. This Act shall not repeal any act providing for the licensing of motoring vehicles imposed by State, County or City authority, but shall be supplemental thereto. All laws and parts of laws in direct conflict herewith are hereby repealed and this Act being necessary for the immediate preservation of the public peace, health and safety, it shall take effect and be in force on [an-] after April 1st, 1921.

Approved: March 3, 1921.

Decree.

Entered in United States District Court Dec. 3, 1921.

(Caption Omitted.)

This cause having been submitted on the 9th of November, 1921 a day of the regular term of this Court, upon the amended petition of plaintiffs, the demurrer and response of defendants, the exhibits to said pleadings and the oral arguments and briefs of Solicitors Poe, Gannaway & Poe appearing for the plaintiff, and Wm. T. Hammock as Assistant to J. S. Utley, Attorney General, appearing for the defendants;

And the court being now well and sufficiently advised as to the issues of fact and of law herein, doth find that Act No. 606 of the General Assembly of Arkansas approved March 3, 1921, is not a property tax but is a privilege tax, and as such is not repugnant to either the Constitution of Arkansas or the Constitution of the United States.

Wherefore, it is considered, ordered, adjudged and decreed that the prayer of the petition for a writ of injunction restraining defendants from collecting said tax, be and the same is hereby denied and that defendants recover of and from the plaintiff all their costs herein expended.

To said finding and decree the plaintiff excepted.

FRANK A. YOUMANS,
Judge.

15 *Petition for Appeal and Assignment of Errors.*

Filed in the U. S. District Court, December 15, 1921.

Comes the complainant, Pierce Oil Corporation, and petitions the Court to grant it an appeal from the order and decree entered in this cause to the United States Circuit Court of Appeals for the (Eighth) Circuit, to the end that the ruling and judgment of this Court may be reviewed by the Circuit Court of Appeals for the Eighth Circuit, and complainant further prays that an order be made restraining the defendants, and each of them, and all prosecuting attorneys, county clerks, county treasurers, their agent, representatives, assistants or deputies, and each of them, from prosecuting complainant under said statute during the pendency of said appeal, to the end that complainant may be protected during the pendency of said appeal and the order and judgment of the Appellate Court made effective in case the decree of this Court shall be reversed.

Complainant files herewith, as a part hereof, its assignment of errors, as follows, to-wit:

1. The Court erred in finding that the tax provided for in Act No. 606, of the General Assembly of Arkansas, approved March 3, 1921, is not a property tax.

2. The Court erred in finding that the tax provided for in said Act is a privilege tax.

3. The Court erred in deciding that said Act and said tax is not repugnant to either the Constitution of Arkansas, or the Constitution of the United States.

4. The Court erred in denying the prayer of this petition for a writ of injunction restraining defendant from collecting said tax.

5. The Court erred in not granting prayer for injunction as prayed for in petition.

For which errors complainant prays that the judgment of the United States District Court, for the Western District of Arkansas, Fort Smith Division, dated December 3, 1921, be reversed
16 and a judgment rendered in favor of complainant and for costs.

POE, GANNAWAY & POE,
Attorneys for Complainant,
By M. W. GANNAWAY.

Appeal allowed this December 15, 1921.

FRANK A. YOUMANS,
Judge.

Cost Bond on Appeal.

Filed in U. S. District Court December 15, 1921.

Know All Men By These Presents, That we, Pierce Oil Corporation, as principal, and Maryland Casualty Company, surety, are held and firmly bound unto Luther Hopkins and the State of Arkansas for the use and benefit of herself and her several counties, in the sum of Two Hundred and Fifty ($250.00) Dollars, to be paid to the said Luther Hopkins, his heirs, executors, administrators, successors or assigns, and to the said State of Arkansas, for the use and benefit of herself and her several counties, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors or assigns, jointly and severally by these presents. Sealed with *your* seals and dated this 14th day of December, in the year of our Lord, One Thousand Nine Hundred and Twenty-one.

Whereas, lately, at the —— term of the United States District Court, for the Western District of Arkansas, Fort Smith Division, in a suit depending in said Court between Pierce Oil Corporation, plaintiff, and Luther Hopkins, et al., defendants, decree and judgment was rendered against said Pierce Oil Corporation, which has obtained appeal from the said Court to reverse the decree and judgment in the aforesaid suit, and a citation directed to the said Luther Hopkins, et al., defendants, citing and admonishing them to be and appear in the United States Circuit Court of Appeals, for the Eighth Circuit at the City of Saint Louis, Missouri, on January 2, 1922.

Now, The condition of the above obligation is such, that if said Pierce Oil Corporation shall prosecute said appeal to effect, and answer all damages and costs if it shall fail to make good its
17 plea, then the above obligation to be void, else to remain in full force and virtue.

PIERCE OIL CORPORATION,
By MALCOLM W. GANNAWAY,
Attorney.

[Corporate Seal.]

MARYLAND CASUALTY COMPANY,
By HUGH LILE,
Attorney in Fact.

Countersigned by
ASHLEY COCKRILL,
Attorney in Fact.

Approved: As a cost bond:
FRANK A. YOUMANS,
Judge.

Agreed and Condensed Statement of Testimony.

Filed in U. S. District Court December 15, 1921.

It is agreed by the above plaintiff and defendants that the condensed form of the testimony submitted in the above case is as follows:

The cost to the Pierce Oil Corporation in preparing and filing the reports and collecting and remitting the tax provided for in Act No. 606, of the General Assembly of Arkansas, for 1921, is approximately the sum of Six Hundred ($600.00) Dollars per month, exclusive of the tax collected and remitted.

POE, GANNAWAY & POE,
Attorneys for Complainant,
By M. W. GANNAWAY.
J. S. UTLEY,
Attorney General, Attorney for Respondents.

(*Waiver of Notice of Approval of Condensed Statement of Testimony.*)

We hereby waive notice as required by law, of the time and place when the United States District Court, for the Western District of Arkansas, Fort Smith Division, shall be requested to approve
18 the above Agreed and Condensed Statement of Testimony.

J. S. UTLEY,
Attorney General, Attorney for Respondents.

(*Approval of Condensed Statement of Testimony by District Judge.*)

The foregoing is a correct statement of the testimony in the above cause.

FRANK A. YOUMANS,
Judge.

Precipe for Transcript.

Filed in U. S. District Court December 15, 1921.

The Clerk will incorporate the following portions of the record in the transcript on appeal in said cause, namely:

The amended petition and exhibits, demurrer and order thereon, response and exhibits thereto, agreed and condensed statement of testimony, and final decree.

POE, GANNAWAY & POE,
Attorneys for Appellant,
By M. W. GANNAWAY.
J. S. UTLEY,
Attorney General, Attorneys for Appellees.

(*Clerk's Certificate to Transcript.*)

I, Wm. S. Wellshear, Clerk of the District Court of the United States for the Western District of Arkansas, certify the foregoing pages, numbered from 1 to 25, inclusive, to contain and constitute a true and correct copy of the record, assignment of errors and all proceedings in the case of Pierce Oil Corporation vs. Luther Hopkins, County Clerk of Sebastian County, Arkansas, et al., No. 365 in Equity in accordance with the precipe of counsel, as the same appear on file and of record in my office as such clerk in the Fort Smith Division of said District.

I further certify that the said transcript is made in return of the appeal of the Pierce Oil Corporation in said cause to the United States Circuit Court of Appeals for the Eighth Circuit.

19 The original citation, with acceptance of service is annexed and transmitted herewith.

In testimony whereof, I hereunto set my hand and affix the seal of said Court at office in the City of Fort Smith, Arkansas this 17th day of December, 1921.

[Seal U. S. Dist. Court, West. Dist. of Ark.]

WM. S. WELLSHEAR,
Clerk.

Filed Dec. 30, 1921.
E. E. KOCH,
Clerk.

(*Order of U. S. Circuit Court of Appeals Granting Injunction and Restraining Order, etc., Dec.* 30, 1921.)

In the United States Circuit Court of Appeals, Eighth Circuit, December Term, 1921, Friday, December 30, 1921.

No. 6008.

PIERCE OIL CORPORATION (Plaintiff), Appellant,

vs.

LUTHER HOPKINS, County Clerk, etc., et al. (Defendants), Appellees.

The application of the appellant for an order to maintain the status quo in this case was argued by counsel for the respective parties, and now, upon consideration,

It is ordered that, on condition that the appellant give a bond with surety or sureties, approved by one of the Judges of this Court, in the sum of Twenty Thousand Dollars ($20,000.00), conditioned to pay any costs and damages that may result from the restraining order and injunction contained in this order, the appellees, Luther

Hopkins, County Clerk of Sebastian County, Arkansas, and his successors in office, J. R. Chandler, County Treasurer of Sebastian County, Arkansas, and his successors in office, and Sam Wood, Prosecuting Attorney of Twelfth Judicial Circuit of Arkansas, and his successors in office, and the officers and agents of the State of Arkansas are restrained and enjoined, pending this appeal and decision thereon and the further order of this Court, from
20 prosecuting any actions against Pierce Oil Corporation under and pursuant to the provisions of Act 606 of the Legislature of the State of Arkansas, entitled "An Act to Levy a Tax upon Gasoline Usel in the Propelling of Motor Vehicles, and for Other Purposes," approved March 29, 1921.

December 30, 1921.

(*Injunction Bond.*)

Know all men by these presents: That we, Pierce Oil Corporation (a corporation), as principal, and Maryland Casualty Company (a corporation), as surety, are held and firmly bound unto Luther Hopkins, County Clerk of Sebastian County, Arkansas, in his official capacity as County Clerk, and his successors in office, J. R. Chandler, County Treasurer of Sebastian County, Arkansas, in his official capacity as County Treasurer, and his successors in office, and Sam Wood, Prosecuting Attorney of Twelfth Judicial Circuit of Arkansas, in his official capacity as Prosecuting Attorney, and his successors in office, and to the State of Arkansas, in the sum of Twenty Thousand Dollars ($20,000.00), for the payment whereof, well and truly to be made, we do severally and jointly hereby bind ourselves, our successors and assigns, firmly by these presents. Sealed with our seals and dated this the 30th day of December, 1921.

The conditions of the above obligation are as follows:

Whereas, Pierce Oil Corporation has commenced suit against said Luther Hopkins, County Clerk as aforesaid, J. R. Chandler, County Treasurer as aforesaid, and Sam Wood, Prosecuting Attorney as aforesaid, in the District Court of the United States for the Western District of Arkansas; and,

Whereas, said Honorable District Court sustained a motion to dismiss said bill of complaint; and,

Whereas, said Pierce Oil Corporation has appealed from said decree of dismissal to the United States Circuit Court of Appeals for the Eighth Circuit and has made application to said United States Circuit Court of Appeals for the Eighth Circuit for an injunction and restraining order against said defendants pending the hearing and decision of said appeal by said Circuit Court of Appeals; and,

Whereas, said Circuit Court of Appeals has granted said
21 Pierce Oil Corporation an injunction and restraining order against said defendants pending the final hearing and decision of said appeal in said United States Circuit Court of Appeals for the Eighth Circuit, a copy of which is hereto attached and made a part hereof, upon the condition contained in said injunction and restraining order;

Now, Therefore, if said Pierce Oil Corporation shall well and truly pay to said appellees, or the State of Arkansas, all costs and damages which may result to said appellees, or the State of Arkansas, from the injunction and restraining order aforesaid, then this obligation shall be null and void, otherwise to remain in full force and effect.

Witness our hands and seals this the 30th day of December, 1921.

PIERCE OIL CORPORATION,
By R. L. FOWLER,
Genl. Manager.

[SEAL] MARYLAND CASUALTY COMPANY,
By N. W. EWING,
Attorney-in-Fact.

Approved this 30th day of December, 1921.
WALTER H. SANBORN,
Senior Circuit Judge.

(Endorsed:) Filed in the United States Circuit Court of Appeals, Eighth Circuit, on December 30, 1921.

22 (*Appearance of Mr. G. T. Priest as Counsel for Appellant.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 6008.

PIERCE OIL CORPORATION, Appellant,

vs.

LUTHER HOPKINS, County Clerk of Sebastian County, Arkansas, et al.

The Clerk will enter my appearance as Counsel for the Appellant.
G. T. PRIEST.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 30, 1921.

(*Appearance of Mr. Sam T. Poe, Mr. Malcolm, W. Gannaway, and Mr. Tom Poe as Counsel for Appellant.*)

The Clerk will enter my appearance as Counsel for the Appellant.

SAM T. POE.
MALCOLM W. GANNAWAY.
TOM POE.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 11, 1922.

23 (*Appearance of Mr. J. S. Utley, Attorney General of Arkansas, as Counsel for Appellees.*)

The Clerk will enter my appearance as Counsel for the Appellees.

J. S. UTLEY,

1/31/22. *Attorney General of Arkansas.*

Judge Wm. T. Hammock, Assistant Attorney General, will handle the case for this department.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 3, 1922.

(*Appearance of Mr. Wm. T. Hammock, Assistant Attorney General of Arkansas, as Counsel for Appellees.*)

The Clerk will enter my appearance as Counsel for the Appellees.

WM. T. HAMMOCK,

Asst. to Atty. General State of Arkansas.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 8, 1922.

24 (*Order of Submission.*)

May Term, 1922.

Monday, May 22, 1922.

This cause having been called for hearing in its regular order, and counsel for appellant not being present and Mr. William T. Hammock for appellees being present but not desiring to make oral argument, this cause is thereupon taken by the Court as submitted on the transcript of the record from said District Court and the briefs of counsel filed herein.

25 (*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1922.

No. 6008.

PIERCE OIL CORPORATION, Appellant,

vs.

LUTHER HOPKINS, County Clerk of Sebastian County, Arkansas, et al., Appellees.

Appeal from the District Court of the United States for the Western District of Arkansas.

Messrs. Boyle & Priest, Mr. H. S. Priest, Mr. E. Moloney, Mr. G. T. Priest, and Messrs. Poe, Gannaway & Poe, submitted a brief for appellant.

Mr. J. S. Utley, Attorney General, Mr. Elbert Godwin, Assistant Attorney General, and Mr. William T. Hammock, Assistant Attorney General, submitted a brief for appellees.

Before Carland, Circuit Judge, and Trieber and Munger, District Judges.

MUNGER, District Judge, delivered the opinion of the Court.

In this suit the appellant sought a perpetual injunction against the enforcement of an act of the Arkansas Legislature, and appeals from a decree dismissing its bill. Section one of the act in question (Acts of Arkansas, 1921, p. 685) is as follows:

"That all persons, firms or corporations who shall sell gasoline, kerosene or other products to be used by the purchaser thereof in the propelling of motor vehicles using combustible type engines over the highways of this state shall collect from such purchaser, in addition to the usual charge therefor, the sum of one cent (1c.) per gallon for each gallon so sold."

26 Other sections of the act make it the duty of every such seller of gasoline or other products to register with the county clerk and in each month to file an itemized report of the sales for the preceding month and of the amount of the tax due from the seller and then at once to pay the amount of the tax to the county treasurer. The seller is made personally liable for the amount of the tax in case of a sale without collecting the tax. It is made a misdemeanor for a seller to fail to file the monthly statement or to fail to pay over the tax due. One-half of the money so collected in any county is to be credited to the county road fund and the other half is to be remitted to the state treasurer for the benefit of its highway improvement fund.

It was established by the pleadings and evidence that the plaintiff sells about three and a half million gallons of gasoline in Arkansas yearly, of which seventy-five percent is sold to purchasers who use it in internal combustion engines to propel vehicles over public highways in the state, and the amount of the tax on such sales would exceed $25,000 per annum.

The plaintiff is at an expense of about $600 a month in preparing and filing the required reports and in collecting and remitting the amount of the tax.

The plaintiff claims that this act of the legislature is in violation of the fourteenth amendment to the Constitution of the United States, and of several provisions of the Constitution of Arkansas. The particular claim of violation of the fourteenth amendment is that plaintiff is deprived of its property without due process of law, because without its consent and without just compensation, it is made liable for the debts of another.

In the trial court the plaintiff claimed the act violated Sec. 5 of Article 16 of the State Constitution of Arkansas which reads as follows:

"All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper."

27 The contention of plaintiff was, (first) that the tax was levied upon gasoline as personal property and lacked the requisite uniformity because it was laid upon gasoline sold for use in engines of vehicles used on the highways and was not laid upon gasoline sold for other purposes and (second) if the tax was levied upon a privilege it was not such a privilege as was contemplated by this portion of the constitution. The act was also claimed to be void for uncertainty.

Since the entry of the decree in this case, the Supreme Court of Arkansas, in the case of Standard Oil Company v. Brodie, — Ark. —, 239 S. W. 753, decided these contentions and held the law to be valid, and appellant concedes the authority of that decision as to the alleged violations of the state constitution.

The claimed violation of the fourteenth amendment to the Constitution of the United States rests upon the assumptions that the tax is levied against the purchaser and that the seller is required to pay the purchaser's tax, without benefit or reimbursement. The first inquiry is whether the seller does pay a tax which is levied against another. The Supreme Court of Arkansas, in the case heretofore cited, declared that the tax was not imposed upon the gasoline as property, nor upon the sale, nor upon the purchase, but was laid upon the privilege of the use of the vehicles mentioned in the act upon the public highways. However, it also stated that "the purpose of the statute is twofold, namely, to impose a tax upon the purchaser of gasoline for the use of the car and to regulate the business of the dealer by requiring him to collect the tax and pay it over to the county treasurer. It is certainly within the power of the legislature, for it does not involve the payment of any fee nor the performance of any unreasonable tax."

It becomes necessary to ascertain the actual effect of the statute, whatever name or description has been applied to it by the State Supreme Court (Standard Oil Co. v. Graves, 249 U. S. 389, 394) in order to determine whether it violates the Constitution of the United States. It is doubtless true that the amount of the tax usually does fall finally upon the purchaser because the seller will naturally fix a price or an amount to be collected for the commodities sold which will include the amount of tax (Clark v. Titusville, 184 U. S. 329, 333). It may also be conceded that what is ultimately gained by the purchaser for the amount of tax so included is the use of
28 the highways for automotive vehicles propelled by gasoline.

In addition, there are some of the essential elements of a tax upon the sale, or the privilege of the sale of the gasoline. The seller

is required to register and to file a report of his sales and show therein "the amount of tax due by said seller." The seller must pay the tax unless he collects the amount from the purchaser. While the first section requires the seller to collect one cent a gallon from the purchaser in addition to the usual charge therefor, no usual charge is fixed by statute, and the effect of the Act is to allow the seller to fix any price he wishes, and to require him to pay one cent a gallon for the gasoline so sold. The penalties provided in the Act are all levelled against the seller. The purchaser is not required to do anything by the Act, although the result may incidently cause an enhanced price for the gasoline.

The conclusion that the tax is not levied against the purchaser disposes of the basis of the only contention made by appellant of a violation of the fourteenth amendment, but it may be added that the conclusion that the tax is an excise tax on the privilege of making sales of the named products, although measured by the gallons sold for a designated use, brings the Act within the proper exercise of the state's power of taxation, when the commerce clause is not involved, (See Standard Oil Co. v. Graves, 249 U. S. 389; Askren v. Continental Oil Co., 252 U. S. 444, 449; Bowman v. Continental Oil Co., 256 U. S. —; Texas Co. v. Brown, — U. S. —, April 17, 1922), and such taxation is not in violation of the fourteenth amendment. Woodruff v. Parham, 8 Wall. 123, 140; Wagner v. City of Covington, 251 U. S. 95, 102, 103; Bowman v. Continental Oil Co., supra; Altitude Oil Co. v. People, — Colo. —, 202 Pac. 180.

The judgment will be Affirmed.

29 *(Decree.)*

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1922, Friday, July 7, 1922.

No. 6008.

PIERCE OIL CORPORATION, Appellant,

vs.

LUTHER HOPKINS, County Clerk of Sebastian County, Arkansas; J. R. Chandler, County Treasurer of Sebastian County, Arkansas, and Sam Wood, Prosecuting Attorney for the Twelfth Judicial Circuit of Arkansas.

Appeal from the District Court of the United States for the Western District of Arkansas.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Arkansas, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that

Luther Hopkins, County Clerk of Sebastian County, Arkansas, J. R. Chandler, County Treasurer of Sebastian County, Arkansas, and Sam Wood, Prosecuting Attorney for the Twelfth Judicial Circuit of Arkansas, have and recover against the Pierce Oil Corporation the sum of twenty dollars for their costs herein and have execution therefor.

July 7, 1922.

30 (*Petition for Appeal to Supreme Court U. S.*)

Comes the above named appellant, Pierce Oil Corporation, and respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that a judgment has therein been rendered on the seventh day of July, A. D. 1922, affirming the decree of the District Court of the United States for the Western District of Arkansas, and that the matter in controversy in said suit exceeds One Thousand Dollars ($1,000.00), besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Eighth Circuit has not final jurisdiction, and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, said appellant prays that an appeal be allowed it in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by the said appellant may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

SAM T. & TOM POE,
SAM T. POE,
Attorneys for Appellant.

Affidavit.

STATE OF ARKANSAS,
County of Pulaski:

Sam T. Poe, on oath, states that he is one of the attorneys for the appellant, the Pierce Oil Corporation, and familiar with the facts set out in the above petition and states that the same are true; that the amount in controversy in this suit is more than One Thousand
31 Dollars ($1,000.00) exclusive of interest and costs.

SAM T. POE.

Subscribed and sworn to before me this the 11th day of September, 1922.

[SEAL.] E. E. KOCH.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 12, 1922.

(Assignment of Errors on Appeal to Supreme Court U. S.)

In the Supreme Court of the United States.

PIERCE OIL CORPORATION, Appellant,

v.

LUTHER HOPKINS, County Clerk of Sebastian County, Arkansas; J. R. Chandler, County Treasurer of Sebastian County, Arkansas; Sam Wood, Prosecuting Attorney of Twelfth Judicial Circuit Court of Arkansas, Appellees.

And now comes the appellant by its solicitors, Sam T. & Tom Poe, and says that in the record of proceedings herein, there is manifest error, and the United States Circuit Court of Appeals for the Eighth Circuit erred in this, to-wit:

1. That the Court erred in holding that Act No. 606 of the General Assembly of the State of Arkansas, approved March 3, 1921, was a privilege tax and that the privilege was the privilege of selling gasoline.

2. That the Court erred in not holding that said Act made it a privilege to operate automobiles on the highways of Arkansas.

32 3. That the Court erred in holding that the tax was not levied against the purchaser of gasoline but was levied against the seller of gasoline.

4. That the Court erred in not holding said Act in violation of the Fourteenth Amendment to the Constitution of the United States.

5. That the Court erred in finding that the tax provided for in Act No. 606 of the General Assembly of Arkansas, approved March 3, 1921, is not a property tax.

6. That the Court erred in finding that the tax provided for in said Act is a privilege tax.

7. That the Court erred in deciding that said Act and said tax are not repugnant to either the Constitution of Arkansas or the Constitution of the United States.

8. That the Court erred in denying the prayer of petitioner's petition for a writ of injunction restraining defendant from collecting said tax.

9. That the Court erred in not granting the prayer for injunction as prayed for in petitioner's petition.

Whereas, the said appellant prays the Honorable Court to examine and correct the errors assigned and for a reversal of the de-

cree of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above entited cause.

BOYLE & PRIEST,
SAM T. & TOM POE,
SAM T. POE,
Solicitors for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 12, 1922.

33 (*Notice of Motion for Continuance in Force of Temporary Injunction.*)

In the United States Circuit Court of Appeals for the Eighth Circuit.

PIERCE OIL CORPORATION, Appellant,

v.

LUTHER HOPKINS, County Clerk of Sebastian County, Arkansas; J. R. Chandler, County Treasurer of Sebastian County, Arkansas; Sam Wood, Prosecuting Attorney of Twelfth Judicial Circuit Court of Arkansas, Appellees.

T. J. S. Utley, Attorney General, Greeting:

You are hereby notified that we will make application to the United States Circuit Court of Appeals at Denver, Colorado, on Monday, September 11th to continue in force the temporary injunction that was heretofore entered in this cause during the pendency of the appeal to the Supreme Court of the United States and to be continued in force until the Supreme Court of the United States shall finally decide this case.

SAM T. & TOM POE,
SAM T. POE,
Attorneys for Appellant.

September 8, 1922.

Received this notice 9/8/22 at Little Rock, and Served same 9/8/22 at Little Rock by delivering copy to J. S. Utley, Attorney General Arkansas.

G. L. MALLORY,
U. S. Marshal Eastern Dist. of Arkansas,
By W. F. FREEMANT,
Deputy U. S. Marshal.

34 (Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 12, 1922.

(Petition to Reinstate and Continue in Force Temporary Injunction.)

Comes now the appellant and moves the court to reinstate the temporary injunction heretofore issued and continue the same in force until this case can be finally heard and determined by the Supreme Court of the United States, and for reasons therefor states:

That this suit was originally filed in the United States District Court for the Western District of Arkansas wherein the appellant asked that the above named defendants and all other County Clerks, County Treasurers and Prosecuting Attorneys of the State of Arkansas be enjoined from in any way enforcing Act No. 606 of the General Assembly of the State of Arkansas, approved March 3, 1921, which petition was finally heard and determined by said court adversely to this appellant, and that this appellant then prosecuted an appeal to this court and procured a temporary injunction enjoining the above named defendants and all other County Clerks, County Treasurers and Prosecuting Attorneys in the State of Arkansas, and their deputies, agents and employees from enforcing the provisions of said Act against this appellant and required this appellant to file a bond in the sum of twenty thousand dollars, conditioned that it would reimburse the above named defendants and all of the County Clerks, County Treasurers and Prosecuting Attorneys in the State of Arkansas and the State of Arkansas for any damages they, or either of them, might sustain if this cause was finally decided against this appellant, and that upon a final hearing of this cause in this court the judgment of the United States District Court for the Western District of Arkansas was affirmed.

That in due time this appellant filed its petition and assignment of errors in this court praying an appeal to the Supreme
35 Court of the United States, which appeal has been granted.

Appellant further states that unless the injunction heretofore granted in this case be reinstated and continued in force during the pendency of its appeal in the Supreme Court of the United States that the above named defendants and all other County Clerks, County Treasurers and Prosecuting Attorneys in the State of Arkansas and their deputies and employees will institute many suits against this appellant, which will result in great damage to it in its business and for which it will have no remedy if they are permitted to enforce said act during the pendency of this appeal.

Wherefore, this appellant asks that said injunction be reinstated and continued in force during the pendency of its appeal in the Supreme Court of the United States and that the above named defendants and all other County Clerks, County Treasurers and Prosecuting Attorneys in the State of Arkansas, together with their deputies and employees, be restrained and prevented from in any way enforcing said Act against this appellant during the pendency of its appeal in the United States Supreme Court.

BOYLE & PRIEST,
SAM T. & TOM POE,
By SAM T. POE,
Attorneys for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 12, 1922.

36 The United States Circuit Court of Appeals for the Eighth Circuit.

PIERCE OIL CORPORATION, Appellant,

v.

LUTHER HOPKINS, County Clerk of Sebastian County, Arkansas; J. R. Chandler, County Treasurer of Sebastian County, Arkansas; Sam Wood, Prosecuting Attorney of Twelfth Judicial Circuit of Arkansas, Appellees.

Citation to Appellee.

UNITED STATES OF AMERICA, *ss:*

To Luther Hopkins, County Clerk of Sebastian County, Arkansas; J. R. Chandler, County Treasurer of Sebastian County, Arkansas; Sam Wood, Prosecuting Attorney of Twelfth Judicial Circuit of Arkansas, Greetings:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington, on the 12th day of October, 1922, pursuant to an appeal, filed in the clerk's office of the United States Circuit Court of Appeals,
37 wherein Pierce Oil Corporation is appellant and Luther Hopkins and J. R. Chandler and Sam Wood are respondents, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness, The Honorable Robert E. Lewis, United States Circuit Judge, this 12th day of September, in the year of our Lord One Thousand Nine Hundred and Twenty Two.

ROBT. E. LEWIS,
United States Circuit Judge for the Eighth Circuit.

37½ [Endorsed:] No. 6008. In the United States Circuit Court of Appeals for the Eighth Circuit. Pierce Oil Corporation, Appellant, v. Luther Hopkins, County Clerk of Sebastian County, Arkansas; J. R. Chandler, County Treasurer of Sebastian County, Arkansas; Sam Wood, Prosecuting Attorney of Twelfth Judicial Circuit Court of Arkansas, Appellees. Citation on Appeal to Supreme Court U. S., and Waiver of Service. Filed Sep. 12, 1922. E. E. Koch, Clerk. Law Offices Poe, Gannaway & Poe, Southern Trust Bldg., Little Rock, Ark. Service of the within citation is waived and hereby accepted this Sept. 12th, 1922. J. S. Utley, Attorney General of Arkansas, for Appellees.

38 (*Order Allowing Appeal and Injunction Order.*)

September Term, 1922.

Tuesday, September 12, 1922.

It is hereby ordered that the appeal in the above entitled case to the Supreme Court of the United States be and is hereby allowed as prayed, upon the said appellant giving a good and sufficient cost bond on appeal in the sum of Five Hundred Dollars ($500.00), to be approved by one of the Judges of this court.

And said appellant, appearing by Sam T. Poe, moving for a further injunction pending said appeal to the Supreme Court of the United States, it is further ordered by this court that, on condition that the appellant give a bond with surety or sureties, approved by one of the Judges of this Court, in the sum of Five Thousand Dollars ($5,000.00), conditioned to pay any costs and damages that may result from the restraining order and injunction contained in this order, the appellees, Luther Hopkins, County Clerk of Sebastian County, Arkansas, and his successors in office, J. R. Chandler, County Treasurer of Sebastian County, Arkansas, and his successors in office, and Sam Wood, Prosecuting Attorney of Twelfth Judicial Circuit of Arkansas, and his successors in office, and the officers and agents of the State of Arkansas are restrained and enjoined until December 1, 1922, from prosecuting any actions against Pierce Oil Corporation under and pursuant to the provisions of Act 606 of the Legislature of the State of Arkansas, entitled "An Act to Levy a Tax upon Gasoline Used in the Propelling of Motor Vehicles, and for Other Purposes," approved March 29, 1921.

September 12, 1922.

39 (*Cost Bond on Appeal to Supreme Court U. S.*)

Know all men by these presents:

That we, Pierce Oil Corporation, a corporation, and United States Fidelity and Guaranty Company, a corporation, are held and firmly bound unto Luther Hopkins, County Clerk of Sebastian County, Arkansas, J. R. Chandler, County Treasurer of Sebastian County, Arkansas, and Sam Wood, Prosecuting Attorney of the Twelfth Judicial Circuit Court of Arkansas, in the full and just sum of Five Hundred Dollars ($500.00), to be paid to the said appellees and their successors in office, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 11th day of September, A. D. 1922.

Whereas, lately, at the May Term, 1922, of the United States Circuit Court of Appeals for the Eighth Circuit, in a suit pending in said court between the Pierce Oil Corporation, appellant, and the

above-named Luther Hopkins, County Clerk, J. R. Chandler, County Treasurer, and Sam Wood, Prosecuting Attorney, appellees, a decree was rendered against the Pierce Oil Corporation, and the said Pierce Oil Corporation has obtained an appeal to the Supreme Court of the United States to reverse said decree as aforesaid, and a citation directed to said Luther Hopkins, County Clerk, J. R. Chandler, County Treasurer, and Sam Wood, Prosecuting Attorney, citing and admonishing them to be and appear in the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date of said citation.

Now, the condition of the above obligation is such that if the said Pierce Oil Corporation shall prosecute said appeal to effect, and answer all costs if it fails to make good its plea, then the above obligation to be void, otherwise to remain in full force and virtue.

40 PIERCE OIL CORPORATION,
By SAM T. POE,
Atty.
UNITED STATES FIDELITY AND GUARANTY COMPANY,
[SEAL.] By DAVID JACOBS,
Attorney-in-Fact.

Sealed and delivered in the presence of:
EMMA GRANT.
FRIEDA KILLINGER.

Approved this 12th day of September, 1922.
ROBT. E. LEWIS,
United States Circuit Judge.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 12, 1922.

(*Injunction Bond on Appeal to Supreme Court U. S.*)

Know all men by these presents:

That we, Pierce Oil Corporation (a corporation), as principal, and United States Fidelity and Guaranty Company (a corporation), as surety, are held and firmly bound unto Luther Hopkins, County Clerk of Sebastian County, Arkansas, in his official capacity as County Clerk, and his successors in office, J. R. Chandler, County Treasurer of Sebastian County, Arkansas, in his official capacity as County Treasurer, and his successors in office, and Sam Wood, Prosecuting Attorney of Twelfth Judicial Circuit of Arkansas, in his official capacity as Prosecuting Attorney, and his successors in office, and to the State of Arkansas, in the sum of Five Thousand Dollars ($5,000.00) for the payment *of* whereof, well and truly to be made, we do severally and jointly hereby bind ourselves, our successors, and assigns, firmly by these presents. Sealed with our seals and dated this 11th day of September, 1922.

41 The conditions of the above obligation are as follows:

Whereas, Pierce Oil Corporation has commenced suit against Luther Hopkins, County Clerk as aforesaid, J. R. Chandler, County Treasurer as aforesaid, and Sam Wood, Prosecuting Attorney as aforesaid, in the District Court of the United States for the Western District of Arkansas; and,

Whereas, said Honorable District Court sustained a motion to dismiss said bill of complaint; and,

Whereas, said Pierce Oil Corporation has appealed from said decree of dismissal to the United States Circuit Court of Appeals for the Eighth Circuit and has made application to the said United States Circuit Court of Appeals for the Eighth Circuit for an injunction and restraining order against said defendants pending the hearing and decision of said appeal by said Circuit Court of Appeals; and,

Whereas, said Honorable Circuit Court of Appeals for the Eighth Circuit having on the 5th day of July, 1922, affirmed the decision of the aforesaid District Court in the above named matter; and,

Whereas, said Pierce Oil Corporation has appealed from the decree affirming the decision of the United States District Court for the Western District of Arkansas to the Supreme Court of the United States and has made application to the United States Circuit Court of Appeals for the Eighth Circuit for an injunction and restraining order against said defendants pending the hearing and decision of said appeal by the United States Supreme Court; and,

Whereas, said United States Circuit Court of Appeals has granted said Pierce Oil Corporation an injunction and restraining order against said defendant until December 1, 1922, in said Supreme Court of the United States; a copy of which is hereto attached and made a part hereof upon the condition contained in said injunction and restraining order;

42 Now, therefore, — the said Pierce Oil Corporation shall well and truly pay to said appellees, or the State of Arkansas, all costs and damages which may result to said appellees, or the State of Arkansas, from the injunction and restraining order aforesaid, then this obligation shall be null and void, otherwise to remain in full force and effect.

Witness our hands and seals this 11th day of Sept. 1922.

PIERCE OIL CORPORATION,
By SAM T. POE,
Atty.

[SEAL.]

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By DAVID JACOBS,
Attorney-in-Fact.

EMMA GRANT.
FRIEDA KILLINGER.

Approved this 12" day of Sept. 1922.

ROBT. E. LEWIS,
United States Circuit Judge.

* * * * * * *

(Certified copy of Power of Attorney issued by the United States Fidelity and Guaranty Company to David Jacobs attached to original bond.)

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Sep. 12, 1922.

43 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the Western District of Arkansas, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the Pierce Oil Corporation was Appellant, and Luther Hopkins, County Clerk of Sebastian County, Arkansas, et al., were Appellees, No. 6008, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with waiver of service endorsed thereon is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-sixth day of September, A. D. 1922.

[Seal of United States Circuit Court of Appeals, Eighth Circuit.]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 29,247. U. S. Circuit Court Appeals, 8th Circuit. Term No. 697. Pierce Oil Corporation, appellant, vs. Luther Hopkins, county clerk of Sebastian county, Arkansas; J. R. Chandler, county treasurer, &c., and Sam Wood, prosecuting attorney of twelfth judicial circuit of Arkansas. Filed November 16th, 1922. File No. 29,247.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. ~~697.~~ 151

PIERCE OIL CORPORATION, APPELLANT,

vs.

LUTHER HOPKINS, COUNTY CLERK OF SEBASTIAN COUNTY, ARKANSAS; J. R. CHANDLER, COUNTY TREASURER OF SEBASTIAN COUNTY, ARKANSAS; SAM WOOD, PROSECUTING ATTORNEY OF TWELFTH JUDICIAL CIRCUIT COURT OF ARKANSAS, APPELLEES.

PETITION TO CONTINUE IN FORCE TEMPORARY INJUNCTION HERETOFORE ISSUED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SAM T. & TOM POE,
SAM T. POE,
Attorneys for Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 697.

PIERCE OIL CORPORATION, APPELLANT,

vs.

LUTHER HOPKINS, COUNTY CLERK OF SEBASTIAN COUNTY, ARKANSAS; J. R. CHANDLER, COUNTY TREASURER OF SEBASTIAN COUNTY, ARKANSAS; SAM WOOD, PROSECUTING ATTORNEY OF TWELFTH JUDICIAL CIRCUIT COURT OF ARKANSAS, APPELLEES.

PETITION TO CONTINUE IN FORCE TEMPORARY INJUNCTION HERETOFORE ISSUED BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Comes now the appellant and presents to this court its petition to continue in force injunction heretofore granted in this cause by the United States Circuit Court of Appeals for the Eighth Circuit, and for reasons therefor, states:

That this suit was originally filed in the United States District Court for the Western District of Arkansas, wherein the appellant asked that the above named defendants, and all other county clerks, county treasurers, and prosecuting attorneys of the State of Arkansas, be enjoined in any ways, and by any means, from enforcing Act No. 606 of the General Assembly of the State of Arkansas, approved March 3, 1921, which suit was finally heard and determined by said court adversely to this appellant, and that this appellant then prosecuted an appeal on its merits to the United States Circuit Court of Appeals for the Eighth Circuit.

That the said United States Circuit Court of Appeals for the Eighth Circuit granted to this appellant a temporary injunction prohibiting the above named defendants and all other county clerks, county treasurers, and prosecuting attorneys of the State of Arkansas, from enforcing in any ways, or by any means, Act No. 606 of the General Assembly of Arkansas, which injunction was to continue and be in force until such time as the United States Circuit Court of Appeals for the Eighth Circuit would hear and determine said cause.

That on July 7, 1922, the United States Circuit Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the Western District of Arkansas. That in due time, the appellant did file its petition for appeal and assignment of error in the said United States Circuit Court of Appeals for the Eighth Circuit praying an appeal to this court, which appeal was by the court granted. That on application of the appellant on the date said appeal was granted by the United States Circuit Court of Appeals for the Eighth Circuit, said court entered an order keeping in force said injunction until the first day of

December, 1922, for the purpose of giving this appellant time to file in this court its transcript and application for a further temporary injunction.

Appellant has on this day filed with the clerk of this court its transcript and assignment of error in accordance with the order of the United States Circuit Court of Appeals for the Eighth Circuit allowing it an appeal to this court.

Appellant states that unless the injunction heretofore granted be continued in force during the pendency of this appeal, that the above named defendants, and all other county clerks, county treasurers, and prosecuting attorneys of the State of Arkansas, their deputies and their employees, will institute many suits against this appellant which will result in great damage to it in its business, and for which it will have no remedy if they are permitted to enforce said act during the pendency of this suit before this court.

Appellant further states that the total amount of gasoline and kerosene sold by it in the State of Arkansas since November 1, 1921, to consumers, and for which it could possibly be liable under this act, amounted to less than eight hundred thousand (800,000) gallons, and that appellant will not be able to sell to consumers for all purposes in Arkansas during the pendency of this suit more than two million (2,000,000) gallons. That the most for which appellant could be liable under the provisions of said act is one cent a gallon for all gasoline and kerosene sold to consumers who purchased the same for the purpose of using the same in combustible-type engines in vehicles operated over the highways of the State of Arkansas.

Appellant further states that when the temporary injunction was first granted in this cause by the United States Circuit Court of Appeals for the Eighth Circuit that appellant

executed a bond, as required by the order of said court, in the sum of twenty thousand dollars ($20,000.00), and that at the time the order was made by the United States Circuit Court of Appeals for the Eighth Circuit, keeping in force said injunction, this appellant executed an additional bond of five thousand dollars ($5,000.00), and that both of said bonds are now in force.

Appellant further states that due notice of the filing of this petition for a continuation of the temporary injunction heretofore granted has been given to each and every one of the above-named appellees through their attorney, J. S. Utley, Attorney General for the State of Arkansas, by delivering to him a copy of this petition and a notice that same would be presented to this court for its action on November 15, 1922, at Washington, D. C.

WHEREFORE this appellant prays that the said injunction heretofore granted in this cause by the United States Circuit Court of Appeals for the Eighth Circuit be continued in force during the pendency of this suit before this court up to and including the day on which this court shall render its decision upon a final hearing of this cause. That the above-named defendants, and all other county clerks, county treasurers, and prosecuting attorneys of the State of Arkansas, together with their deputies and employees, be restrained from, in any way, enforcing said act No. 606 of the General Assembly of the State of Arkansas against this appellant during the pendency of this suit in this court, and for all other necessary and proper relief which to the court may seem meet and the nature of the case may require.

SAM T. & TOM POE,
SAM T. POE,
Attorneys for Appellant.

STATE OF ARKANSAS,
County of Pulaski:

M. F. Lackey on oath states that he is Division Manager for the Pierce Oil Corporation in the State of Arkansas and in charge of its business and authorized to make this affidavit; that the facts set out in the foregoing petition are true and correct.

M. F. LACKEY.

Subscribed and sworn to before me this 13th day of November, 1922.

[Seal of R. C. Powers, Notary Public, Pulaski Co., Ark.]

R. C. POWERS,
Notary Public.

My commission expires 5/18/26.

[Endorsed:] No. —. In the Supreme Court of the United States. Pierce Oil Corporation, appellant, *vs.* Luther Hopkins *et al.*, appellees. Petition to continue in force temporary injunction heretofore issued by the United States Circuit Court of Appeals for the Eighth Circuit. Law offices Poe, Gannaway & Poe, Southern Trust Bldg., Little Rock, Ark.

[Endorsed:] File No. 29247. Supreme Court U. S., October Term, 1922. Term No. 697. Pierce Oil Corporation, appellant, *vs.* Luther Hopkins, county clerk of Sebastian County, Arkansas. Petition to continue in force temporary injunction heretofore issued by the United States Circuit Court of Appeals for the Eighth Circuit. Filed November 16, 1922.

No. 151

IN THE

Supreme Court of the United States

PIERCE OIL CORPORATION, Appellant

v.

LUTHER HOPKINS, COUNTY CLERK OF SEBASTIAN COUNTY, ARKANSAS, ET AL., Appellees

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANT

TOM POE,
LOUIS TARLOWSKI,
Of Counsel.

SAM T. POE,
Solicitor for Appellant.

CENTRAL PRINTING CO. LITTLE ROCK

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LIST OF AUTHORITIES CITED

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR APPELLANT

STATEMENT.

This is a suit instituted in the United States District Court for the Western District of Arkansas by the appellant against the appellees seeking to have Act Number 606 of the General Assembly of the State of Arkansas of 1921 declared inoperative and void so far as it affects the appellant.

The appellant, the Pierce Oil Corporation, alleged in its complaint that it was a corporation organized under the laws of the State of Virginia and authorized to do business in the State of Arkansas, and was engaged in producing, refining and selling gasoline and other petroleum products and that in the course of such business it has sold and is selling in the State of Arkansas large quantities of gasoline to wholesalers as well as consumers.

That the appellees were officers of Sebastian County, Arkansas, and entrusted with the enforcement of Act No. 606 of the General Assembly of Arkansas for 1921, approved March 3, 1921; that said act was in violation of, and repugnant to, the Fourteenth Amendment to the Constitution of the United States, in that it deprives appellant of its property without due process of law, in that without its consent and without just compensation said act makes appellant liable for the debts of another and subject to punishment by fine for the acts of another committed without appellant's connivance, consent, participation or control; and in that said act deprives appellant of its property and appropriates the same for public use without just compensation; that said act is repugnant to Section 23, Article II, of the Constitution of the State of Arkansas, in that said act delegates to appellant power to levy and collect a tax; that said act is repugnant to Section 16, Article V, of the Constitution of the State of Arkansas, in that said act levies an arbitrary tax upon property and not according to its value; and that said act is void for the reason that it requires the seller of gasoline to collect a tax on all gasoline sold to purchasers for the purpose mentioned in the act, without providing any method or means by which the seller may determine how said gasoline is to be used, and further, because it makes the seller the collector of the tax and both civilly and criminally liable for the same without providing any method by which the seller of gasoline may enforce the collection of said tax; and that said act is in violation of Article II, Section 18, of the Constitution of Arkansas, in that it grants an immunity to citizens and classes of citizens, which, upon the same terms is not granted to all citizens (Tr., pp. 2-6).

Appellees filed demurrer and response alleging that appellant's petition did not state facts sufficient to entitle it to the relief prayed for and stating that said act levied a privilege tax instead of a property tax and denying said act was in violation of either the Constitution of the State of Arkansas or the Constitution of the United States and attaching to said demurrer and response a copy of Act No. 606, approved March 3, 1921 (Tr., pp. 6-11).

The cause was submitted upon the petition of the appellant, the demurrer, response, and exhibits of the appellees and a stipulation that it cost the appellant, the Pierce Oil Corporation, approximately six hundred ($600.00) dollars per month to file the reports, collect the tax and remit the same as required by said act.

The court found that Act No. 606 of the General Assembly of Arkansas, approved March 3, 1921, was not a property tax, but a privilege tax and as such was not repugnant to either the Constitution of Arkansas or the United States and denied appellant's petition for a writ of injunction restraining the appellees from the collection of said tax (Tr., pp. 11-12).

Whereupon, the appellant duly prosecuted an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, where said cause was duly heard and the judgment and decree of the United States District Court for the Western District of Arkansas was affirmed; and an appeal has been duly prosecuted to this court.

ASSIGNMENT OF ERRORS.

1. The court erred in holding that Act No. 606 of the General Assembly of the State of Arkansas, approved March 3, 1921, was a privilege tax and that the privilege was the privilege of selling gasoline.

2. The court erred in holding that said act made it a privilege to operate automobiles on the highways of Arkansas.

3. The court erred in holding that the tax was not levied against the purchaser of gasoline but was levied against the seller of gasoline.

4. The court erred in not holding said act in violation of the Fourteenth Amendment to the Constitution of the United States.

5. The court erred in finding that the tax provided for in Act No. 606 of the General Assembly of Arkansas, approved March 3, 1921, is not a property tax.

6. The court erred in finding that the tax provided for in said act is a privilege tax.

7. The court erred in deciding that said act and said tax are not repugnant to either the Constitution of Arkansas or the Constitution of the United States.

8. The court erred in denying the prayer of petitioner's petition for a writ of injunction restraining defendants from collecting said tax.

9. The court erred in not granting the prayer for injunction as prayed for in petitioner's petition.

ANALYSIS OF ACT.

The title to Act No. 606 is as follows:

"AN ACT TO LEVY A TAX UPON GASOLINE USED IN THE PROPELLING OF MOTOR VEHICLES AND FOR OTHER PURPOSES."

Section One of the Act provides:

> "All persons, firms or corporations who shall sell gasoline, kerosene or other products to be used by the purchaser thereof in the propelling of motor vehicles using combustible type engines, over the highways of this State, shall collect from such purchaser, in addition to the usual charge therefor, the sum of one cent (1c) per gallon for each gallon so sold."

Section Two of the act provides that the seller of such gasoline or other products shall register with the county clerk of the county in which said seller is engaged in business, and that on or before the tenth day of each month said seller shall file with the county clerk of the county in which said seller is doing business, a complete, itemized and verified statement showing the sales of such gasoline, kerosene or other products to purchasers using the same for propelling motor vehicles, for the calendar month next preceding said statement; that said statement shall show the amount of tax due by said seller upon such sales; that said seller shall pay at once into the county treasury the amount of tax shown to be due by said statement.

Section Three of the act provides that if any such seller shall fail to collect the tax provided for in Section 1, he shall be personally liable for the amount of such tax so uncollected.

Section Four of the act provides that the seller shall file with the county clerk of each county in which he shall have made a sale during the preceding month, a verified statement showing the amount of gasoline, kerosene and other products suitable for use for the propelling of motor vehicles, sold by him to each retailer within each county, during the calendar month preceding.

Section Five of the act provides that one-half of the tax required by the act shall go to the county where the sale of the gasoline or other products was made, and the other one-half shall be paid to the Treasurer of the State of Arkansas, to the credit of the Highway Improvement Fund.

Section Six of the act makes it a misdemeanor punishable by a fine of not less than ten dollars nor more than one thousand dollars for the seller to fail to file the statements required in the act or to fail to account for all money due by seller under the terms and provisions of the act, and that the amount of the tax due and unpaid by the seller shall be recovered by the prosecuting attorney for the district, in the name of the State of Arkansas, by civil action.

Section Seven of the act declares an emergency and makes the statute take effect on and after April 1, 1921.

THE ACT IS VOID FOR THE FOLLOWING REASONS:

I.

Because the act is so uncertain, indefinite and unenforceable as to be void.

II.

Because the act violates the due process of law clauses of the State and Federal Constitutions.

III.

Because the act is an arbitrary and unreasonable discrimination against certain citizens or classes of citizens.

UNCERTAINTY.

By the terms of the act it will be seen that the seller must collect or pay one cent a gallon for all gasoline sold by him to be used by the purchaser in internal combustible type engines in motor vehicles using the highways of the State. Impliedly, the consumer can not, and must not collect, and does not have to pay, any tax upon gasoline sold by him for any other purpose or to any other person than those mentioned in the act. If the vendor sells gasoline to a person to be used by him *in* combustible type engines in motor vehicles using the highways, he must collect the one cent a gallon or he himself becomes liable therefor, and whether he collects or not he must account to the county treasurer each month for the tax of one cent a gallon on each gallon sold by him during the preceding month to be used in combustible type engines on the highways. If he does not account for this tax, and the whole tax provided for, he is subject to a fine of from ten dollars to one thousand dollars. The test of whether he must collect, pay or account for the tax is the future use of the gasoline sold. Each time he sells gasoline he must ascertain at his peril whether the gasoline is to be used by the purchaser in the kinds of engines specified. But how shall the seller obtain this information? He must rely solely upon the information furnished by the purchaser, but

the purchaser incurs no penalty or disfavor in the eyes of the law if he misrepresents the future use of the gasoline. It may be that the purchaser does not know what he will in the future do with the gasoline, yet the seller must ascertain this fact or he will be punished if the minions of the law learn he has not obtained this information. The statute gives the seller no possible way of obtaining this information in order to protect himself from future criminal prosecution. Let us take a hypothetical case: A negotiates with B for the purchase of gasoline. B, the seller, must know first whether A is to use the gasoline himself or not, for any purpose. A may be buying it for personal use or for resale; if for resale no tax is due, whether to be used in combustible type engines or not. If A is to use the gasoline himself, B must ascertain what part of the gasoline will be used in combustible type engines on the highways. If A is buying the gasoline to be partly used in automobiles over the highways and partly in stationary engines, and partly in farm tractors, it would be utterly impossible, we apprehend, for A to know just how much of the gasoline would be subject to the tax under this act, but how much more difficult would it be for B to understand how much tax to collect. Again, A may live on the borders of the State and buy gasoline in Arkansas to be used partly in combustible type engines on the roads of Arkansas and partly in combustible type engines using the roads in other States. How can he then tell what part will be used in Arkansas and what part in another State? A tax would be due on the part used in Arkansas, and not on the part used elsewhere, but it makes little difference to A, the purchaser, what the gasoline is to be used for or in what kind of engines it is to be used, for he incurs no disfavor in the eyes of the law, is subject to no penalty for misinformation or uncertainty as to the use of gasoline, yet the seller must at his peril find out these things or he will be subject to criminal prosecution.

Under this statute it is impossible for the seller to ascertain upon any given sale of gasoline whether he will be subject to criminal prosecution for not collecting or paying the tax thereon? Is it possible for him to protect himself from criminal prosecution? Is it possible for him to do anything to determine whether his act is criminal or not? Does the statute contain

that degree of definiteness and certainty required of all laws, and particularly penal laws?

There was a time when laws were secret, when their terms were kept from those who were required to obey them, and under them a man might be punished for violating a law which he never heard of and which has been purposely kept from him. He had no opportunity to avoid doing the act it was a crime to do. That day is past. The spirit of the law now is to give the widest possible publicity to laws in order that those to whom they are applicable may understand their terms and do or avoid doing those things provided for in the laws. Along with the abolition of secret laws, grew up the doctrine that law must be certain and definite, so definite that those to whom it is applicable may know in advance whether a given act is criminal or not criminal. Or as was stated in the case of Tozier v. U. S., 52 Fed. 917:

> "But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not * * *."

There must be some definiteness and certainty, as was said in R. R. Co. v. Dey, 35 Fed. 876:

> "In Dwar St. 652, it is laid down, 'that it is impossible to dissent from the doctrine of Lord Coke, that acts of parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters * * *.'
>
> "Lieb. Herm. 156. In this the author quotes the law of the Chinese Penal Code, which reads as follows:
>
> " 'Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, thought not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows.'
>
> "There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate."

Or as was said in U. S. v. Brewer, 11 Sup. Ct. Rep. 541:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

In Succession of Pizzati (La.), 75 So., at page 508, in declaring a statute for adoption in Louisiana void because no mode was prescribed in the statute for carrying out the adoption, the court applied the doctrine of "*Ubi jus incertum, ibi jus nullum.*"

In Griffin v. State (Texas), 218 S. W. 494, the statute provided that it should be unlawful for any person to operate an automobile at night upon the public highways of the State, whose front lamps should project *a light of such brilliancy as to seriously interfere with the sight of or temporarily blind the vision of the driver of a vehicle approaching from an opposite direction.* The Supreme Court of Texas declared this statute to be so uncertain and indefinite as to be void. The court said on page 494:

> "Before a law, especially one penal in its nature, can be upheld and enforced, there should be some certain standard by which a person could determine in advance whether or not he is complying with the same. But, under this statute, there is no definite legal standard by which he can be guided, but the statute leaves to the driver of the vehicle approaching from the opposite direction, the determination as to whether his right is so seriously interferred with or his vision so temporarily blinded as to constitute the person using said lamps guilty of a violation of a law of the State of Texas, for which he should be punished. The determining factor of the guilt or innocence of the accused is to be determined by the effect of the light upon the vision upon each individual driver of a vehicle in the opposite direction."

In concluding the court said:

"That the statute is commendable in purpose, that it strikes at an annoying evil, is not to be questioned; but its terms are so vague that we are constrained to hold that, under the principles obtaining in the framing of criminal statutes, it is inoperative and unenforceable, as denouncing a crime. It is therefore ordered that the judgment be reversed and the prosecution dismissed."

The whole doctrine is summarized in Black on Interpretation of Laws, page 99, as follows:

"It is an ancient and well known maxim of the law that, *Lex non cogit ad impossibilia,*' or, as is often expressed, '*lex non intendit aliquid impossible,*' and these maxims are declared to be applicable in the construction of statutes. 'The law itself,' said an English court, 'and the administration of it, must yield to that to which everything must bend—to necessity. The law, in its most positive peremptory injunctions, is understood to disclaim, as it does in its general aphorisms, all intention of compelling them to impossibilities; and the administration of law must adopt that general exception in the consideration of all particular cases * * *. Hence if a statute apparently *requires the performance of things which can not be performed,* or apparently bases its commands upon the assumption of an impossible state of affairs, the court will seek for some interpretation by its terms, not too strained or fantastic, which will avoid these results * * *. If the Legislature does require an impossibility in language too plain to be mistaken or to be explained away, the act will simply be rendered inoperative thereby, and it becomes the duty of the court to pronounce accordingly."

In Potter v. Douglas County, 87 Mo. 239, the Constitution of Missouri provided that no county should become indebted in any amount exceeding in any one year the income provided for such year, without the assent of two-thirds of the qualified voters thereof, voting in an election to be held for that purpose. An act of the Legislature made it a penalty for the sheriff or jailer of any county to refuse to accept prisoners from other

counties where there were no jails or insufficient ones, or for failure safely to keep, maintain and feed such prisoners, or carry them back to the county committing them for trial. The sheriff of Greene County, Missouri, under this statute, was forced to take some prisoners from Potter County. He safely kept and maintained them and carried them to Potter County for trial, for which he rendered a bill for $459.00 to Potter County. Payment of the bill was refused and suit brought thereon. The court held that the constitutional provision was so vague, indefinite and impossible of application that it was void, and said on page 242:

> "The maxim of '*lex non cogit ad impossibilia*,' may possibly be invoked in the present case—a maxim invocable whether the law be statutory or organic."

There are many other authorities on this phase of the case, but we do not deem it necessary to discuss them or quote from them at greater length. Sutherland on Statutory Construction, page 141; Cook v. State (Ind.), 59 N. E. 489; Endlich on Interpretation of Statutes, page 673; People v. Admire, 39 Ill. 251; Liebers Hermeneutics, 156 ff; 8 R. C. L. 58.

In conclusion of this part of the argument and applying the principles laid down above, we submit that since it is impossible for the seller of gasoline to know when he may or he may not be guilty of a misdemeanor in performing an act, namely, the selling of gasoline, and since the law gives him no way of finding out the purpose to which the gasoline is to be put, and since he will be punished or not punished for doing something he can not possibly do—this act, must be held void for uncertainty. In its very nature this must be true of Act No. 606, because the test of the seller's guilt in the eyes of the law is the mental state of the buyer at the time the gasoline is bought. No way is given the seller to ascertain this mental state, yet he is required under punishment of the law correctly to ferret from the buyer for what purpose the gasoline is to be used, when the buyer himself either does not know or can not anticipate the future use of the gasoline.

VIOLATION OF DUE PROCESS OF LAW CLAUSE.

The Fourteenth Amendment to the Constitution of the United States, provides:

> "Nor shall any State deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

We contend that Act No. 606 violates the above clause of the Federal Constitution, in that said act makes vendors of gasoline liable for the debts of another without the vendor's consent and without compensation, and in that said act makes said vendor subject to punishment or fine for the act of another committed without their connivance, consent or participation; and further, in that said act deprives said vendors of their property and appropriates it for public or private use, without just compensation.

Under this heading we assume for the sake of argument that the statute lays a privilege tax and that the Legislature has a right to levy such a tax. We, nevertheless, contend that the statute is void because it violates the due process of law clause of the Constitution of the United States. Reviewing the act again, it will be seen that if this is a valid tax upon the consumer of gasoline for the privilege of using the roads, as was held in the case of Standard Oil Co. v. Brodie, 153 Ark. 114, 239 S. W. 753; the seller is required to collect the tax and pay it to the treasurer of the county. No way is provided whereby the seller may collect the tax due to the State from the buyer. The seller is made a mere collection agency for the State, with no way to enforce payment, and yet becoming liable himself for failure to collect, and penalized for failure to pay the tax.

We submit that the reason given by the Supreme Court of Arkansas in the case of Standard Oil Company v. Brodie, *supra*, in holding that the seller of gasoline had an adequate remedy to enforce the collection of this tax by refusing to sell gasoline unless the tax was paid, is unsound; that to force the seller of gasoline to resort to the remedy pointed out in that case would also be a violation of the due process of law clause

of the Constitution of the United States for the effect would be to destroy the appellant's business of selling gasoline. We submit that it is beyond the authority of the State Legislature to prohibit the appellant, or any other citizen of the State of Arkansas, from engaging in the lawful business of selling gasoline and that to deprive the appellant of its right to engage in this business would also be taking property without due process of law.

The question, therefore, here is:

Has the State the power and right to require the seller of gasoline to collect a tax from the buyer without just compensation? We contend that the State has no such power, and that an attempt to exercise such power is in violation of the due process of law clause of the United States Constitution.

The term "due process of law" has as many meanings as there are classes of cases to which it may be applied. The term means one thing when applied to cases of eminent domain, another meaning when applied to cases of regulation, and still another when applied to cases of taxation for revenue. Even in cases of taxation for revenue the term has many different meanings, each depending upon the exact question involved.

In this case it is useless to speculate upon the meaning of due process of law in general or in other cases with totally different issues. In this case we are interested in the meaning of due process of law only in cases involving the question we have here raised. To this end we have directed our investigation, and upon this particular issue we have reviewed and cite decisions of the State and Federal Courts. The simple and plain question before the court is this: Is it or is it not a violation of the due process of law clauses of the State and United States Constitution to require the seller of gasoline to collect, without compensation, taxes due from a purchaser, providing the seller with no way of enforcing payment and making the seller pay it out of his own pocket if he can not collect from the buyer? We contend this is in direct violation of the due process of law clauses of the Constitution of Arkansas and the Constitution of the United States.

We trust counsel for appellees will face this issue squarely, and answer if they can, the seemingly unanswerable authority of the cases here cited deciding this identical proposition, which we submit sustains our contention that this act violates the due process of law clause of the Constitution of the United States.

It is a rule of law that as to corporations the State may lay a tax upon stockholders or the stock, and require the corporation to collect the tax and account for it, when the statute gives the corporation a lien upon the stock for reimbursement.

The first case of this kind in the United States Supreme Court was the case of National Bank v. Kentucky, 9 Wallace 353. In this case the State of Kentucky laid a tax of fifty cents upon each share of stock in any bank or moneyed corporation, said tax to be collected by the corporation, and upon failure of the corporation to collect, it should itself become liable for the tax together with twenty per cent penalty, and the charter of the bank might be forfeited for not complying with the act. The act also provided that the corporation should have a lien upon the stock for reimbursement. It was contended by the bank that all of its stock was invested in non-taxable United States securities. The court sustained the tax solely upon the ground that the statute had given to the bank a lien, the foreclosure of which would protect the bank and reimburse it for anything it had to pay on account of the tax due from the stockholders. The court said it was no more than a garnishment or attachment:

> "If the State of Kentucky had a claim against the stockholder of the bank who was a nonresident of the State, it could undoubtedly collect the claim by legal proceedings, in which the bank could be attached or garnisheed, and made to pay the debt out of the means of its shareholders under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the State on the bank shares. It is no greater interference with the functions of the bank than any other legal proceeding to which its business operations may subject it."

It will be noted in this case the court decided that the statute did not violate the due process of law clause of the Con-

stitution, because it gave the corporation a lien on the stock for reimbursement. In the case at bar, there is no lien given to the seller and no other way or means provided for or suggested whereby the seller may be reimbursed for any tax that he is required to pay for the buyer.

There are many cases in the Federal Courts, as well as the State Courts, on this point, but they all turn upon the question of whether there is a means of reimbursement provided for when the collection agent has to pay what the taxpayer refuses to pay.

National Bank v. Hoffman, 93 Iowa 119.

R. R. v. Jackson, 7 Wall. 262.

U. S. v. R. R. Co., 17 Wall 326.

Stapylton v. Thaggard, 91 Fed. 93, 33 C. C. A. 353.

First Nat. Bank of Aberdeen v. Chehalis County, 166 U. S. 440.

Street Car Co. v. Morrow, 3 Pickle (Tenn.) 406.

Ottawa Glass Co. v. McCaleb, 81 Ill. 556.

Commonwealth v. R. R. Co., 186 Penn. 235.

First National Bank v. Lyman, 59 Kan. 410.

These cases are all explained in the case of Stapylton v. Thaggard, 91 Fed., at page 95. In this case the statute taxed the stock and made the bank the collection agency. The bank went into the hands of a receiver before any taxes on the stock had been paid by the holders thereof and before the bank had paid to the State any taxes due thereon. The question before the court was whether the claim of the State against the receiver for the bank, for the taxes, should be allowed. The court held that the claim should not be allowed, and said on page 95:

"As we construe the cases, from First National Bank v. Commonwealth, 9 Wall 353, to First National Bank v. Chehalis County, 166 U. S. 440, 17 Sup. Ct. 629, the bank is made to pay the taxes assessed by the State against its shareholders, when the State statutes lay such duty upon the bank, *upon the theory* that the shares are valuable, *and that the bank has assets in its hands belonging to the shareholders from which it can recoup.* Where a bank is insolvent and has passed into the hands of a receiver, the shares are generally worthless; and the receiver has no assets belonging to the shareholders which can be applied to the payment of taxes assessed on shares. In such case, we are of the opinion that the tax assessed against the shares of the bank, can not be collected from the receiver, or from assets in his hands."

To the same effect, see Boston v. Beal, 55 Fed. 26.

The cases of Commonwealth v. R. R. Co., 186 Penn. 235, and First National Bank v. Lyman, 59 Kan. 410, are especially called to the attention of the court.

The rules of due process of law applicable to property taxation have no application here. About all that is meant by due process of law in property taxation is that before the tax is finally fixed upon property, there must be a valid assessment, notice of such assessment, and an opportunity afforded the taxpayer to contest the same. Evidently these rules would not apply if this is a privilege tax, because there is no assessment unless the act itself could be considered as an assessment. Even in such case the taxpayer should have opportunity upon notice to contest the validity of the tax or the amount thereof, before the tax is finally fixed. No such opportunity is given the taxpayer.

We take it, however, that the rules applicable to property taxation have no application here. We have been unable to find any case directly in point, and assume that the reason for this is that this form of taxation is extremely rare and that no State or few States have ever attempted to make one person collect taxes from another person without providing any means of reimbursement. It costs the appellant, as a seller, six hun-

dred ($600.00) dollars per month to file the reports, collect the tax and account for it. It is rendering a service to the State; it is not paid for it; it has no way of reimbursement. We submit that such a statute as this is in its essence and by its terms the taking of property without due process of law. We do not see how the State can require of its citizens to collect its taxes at expense to that citizen, without compensation, any more than it could require a citizen to build public buildings without compensation. Certainly the latter would be in violation of the law.

However, this may be, if a claim for taxes against a bank as collector from its shareholders, can not be allowed in insolvency proceedings, although the statute gave the bank a lien upon the stock for reimbursement. (Stapylton v. Thaggard, 91 Fed. 93), we do not see how the State can require the seller of gasoline to collect its taxes due from the buyer, at great expense to the seller, without any compensation therefor or without providing any way of compelling payment. This, however, is what the statute does, and we submit that it renders the whole act void.

DENIES EQUALITY OF THE LAWS.

Under this heading we assume for the sake of argument that the Legislature had power to levy such a tax; that it is definite and certain; and that it does not violate the due process of law clause of the Constitution of the United States. We contend here that if the act is valid in all other respects, it is nevertheless void because it is an unreasonable, arbitrary and oppressive discrimination against certain citizens or classes of citizens and by its very terms denies to the citizens of Arkansas equal protection of the law.

The Fourteenth Amendment of the Constitution of the United States provides:

> "Nor shall any State deprive any person of life, liberty or property without due process of law; nor *deny to any person within its jurisdiction the equal protection of the law.*"

The last clause of the above quotation is the one we invoke in this discussion.

The constitutional provision above quoted applies to all laws of the General Assembly whether dealing with privilege or property taxes. By the sweeping provisions of this clause, the General Assembly can not unreasonably discriminate between citizens of the State, whether in matters of taxation or other matters. See Waters-Pierce Oil Co. v. City of Hot Springs, 85 Ark. 509; 109 S. W. 293.

If the act in question grants to some citizens of Arkansas privileges and immunities which upon like terms are denied to other citizens in similar circumstances, then the act is void as in violation of the clause of the Constitution above quoted.

Looking to the act itself, it will be seen that a consumer of gasoline who makes his purchase of gasoline within the State of Arkansas is required to pay the tax; but that the citizen of Arkansas who buys his gasoline without the State does not have to pay the tax. Both of these citizens may use the same highways in the same kind of car, yet, according to this act the

former must pay the tax and the latter need not. It is conceded that there are many, many citizens of Arkansas living in border towns who go across the State line to purchase their gasoline to escape paying the tax, and that these citizens use the roads of Arkansas in the same manner, with the same kind of cars, as citizens who purchase their gasoline within the borders of this State. It will also be conceded that the seller of gasoline may ship gasoline into Arkansas from without the State and sell it in the original container to the consumer who uses it in combustible type engine in propelling motor vehicles over the highways of the State and still not be liable for this tax because this would be in interference with interstate commerce. We submit, that, in the first instance the consumer who purchases gasoline without the State is granted an immunity from taxation by the terms of this act which is not granted (but which is expressly denied) to citizens under precisely the same circumstances who purchase their gasoline within the State. We further submit that the seller of gasoline who purchased it without the State and shipped it into the State and sells it to the consumer in original container could not be required to answer for this tax. Western Oil Refining Co. v. Lipscomb, 244 U. S. 346.

We further submit that the making of the place of purchase of gasoline the determining factor in laying this tax is of itself unreasonable, arbitrary and discriminatory. If this act provides for a tax for the privilege of using the highways, as was held in the Standard Oil Co. v. Brodie, *supra*, then we see no escape from the conclusion that by its terms many citizens, an untold number, are not required to share a burden of taxation for the upkeep of public property which they enjoy upon the identical terms with others who are required to pay the tax. If this is true, we submit that the Federal Constitution has been violated by this act, because it denies equality of the laws.

In the case of Waters-Pierce Oil Co. v. City of Hot Springs, *supra*, the city of Hot Springs levied a tax of fifty dollars upon each oil wagon using the streets of Hot Springs, a tax of twenty-five dollars on all ice wagons, and ten dollars or less for all other kinds of vehicles using the streets. The court held that this ordinance was in direct contravention of the Constitution

in that it was an arbitrary discrimination against the owners of oil wagons, and granted to the owners of other wagons an immunity or privilege which was not granted to other citizens in the same circumstances and upon the same terms. We invoke the doctrine laid down in this case and submit that a discrimination in taxation because of the place where gasoline is bought, irrespective of where and how it is to be used, is necessarily an unreasonable and arbitrary discrimination.

It might be argued that the provision of the Constitution now referred to has no application because it applies only to natural persons and not to corporations. In answer to this, the act itself does not apply solely to corporations, but to all vendors or purchasers of gasoline for the purpose mentioned in the act, and we can not presume that corporations alone were meant to be taxed. See Waters-Pierce Oil Co. v. City of Hot Springs, 85 Ark. 514; Raymond v. Chicago Traction Co., 207 U. S. 20.

CONCLUSION.

In conclusion, we submit that Act No. 606 is void because it is uncertain and unreasonable; because it violates the due process of law clause of the Federal Constitution; because it is unreasonable, arbitrary and oppressively discriminatory; we therefore respectfully request the court reverse this case and perpetually enjoin the defendants, and each of them, from enforcing said act against the appellant.

Respectfully submitted,

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Of Counsel.

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No. 151

IN THE

United States Supreme Court

PIERCE OIl CORPORATION ..... *Appellant,*

vs. No. 151.

LUTHER HOPKINS, COUNTY CLERK OF SEBASTIAN COUNTY, ARKANSAS, ET AL. ..... *Appellees*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

ABSTRACT, ARGUMENT AND BRIEF FOR APPELLEES

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ABSTRACT.

Adopting the statement of appellant's brief, the appellees now further show that in the court below a demurrer to appellant's original petition as a whole was interposed on the ground that appellant is not the real party interested, and, therefore, not competent to sue. And a special demurrer was interposed to so much of the petition as complained that Act 606 is repugnant

to the Constitution of Arkansas. This resulted in the filing by appellant of an amended petition; and by permission of the court the original demurrers and response of appellees were treated as demurrers and response to the amended petition. And the cause was submitted to the court upon the amended petition and demurrers and response thereto as set out in the transcript, pages 2 to 9.

ARGUMENT AND BRIEF.

I.

Replying to appellant's brief (pages 5 and 6), appellees concede that analysis of the Act discloses:

1. Tax to be paid by the purchaser.

2. Tax to be collected by the seller.

3. Act to be enforced against the seller in its regulations.

4. That the burden of collecting and accounting for the tax and making report is laid upon the seller.

5. That the State confers upon all, who collect, report and pay over such tax, the right to sell gasoline or other products for use on the highways. (Act No. 606, Tr., pp. 10 and 11.)

And upon the latter concession the appellees contend that in the exercise of her police power the State as a sovereign may impose upon individuals and corporations such reasonable rules and regulations as are necessary for adjustment and administration of her tax-

ing systems. Without this inherent police power no government could administer its laws, either civil or criminal; and such police power as an attribute of sovereignty like the taxing power extends to all things not prohibited by the Constitution.

> "Unlimited power of taxation is an essential attribute of sovereignty, and restriction on the power to impose a particular kind of tax must be found in the Constitution. The constitutional provisions respecting uniformity in taxation apply only to property taxes and not to taxation of privileges. The State may select the privileges to be taxed; and the omission, from the list to be taxed, of a number of occupations does not constitute an unlawful discrimination between persons in like situation."
>
> Davies vs. Hot Springs, 141 Ark., 521.

> "It was never contemplated when the Fourteenth Amendment was adopted to restrain or cripple the taxing power of a State, whatever the methods they devised for the purpose of taxation, unless those methods by their necessary operation were inconsistent with the fundamental priciples embraced by the requirements of due process of law and equal protection of the law."
>
> Southwestern Oil Co. vs. Texas, 217 U. S. 114.

> "The State in the exercise of its police power may fully and completely regulate the business of insurance."
>
> Fireman's Insurance Co. vs. Davies, 130 Ark., 576; also
>
> Lewelling vs. Mfg. Woodworkers' Underwriters, 140 Ark., 124.

"The police power, speaking generally, is reserved to the States: for there is no grant thereof to Congress."

Keller vs. United States, 213 U. S., 138.

"The power of the States to regulate matters of internal police within their limits, applies not only to the health, morals, and safety of the public, but also to whatever promotes the public peace, comfort and convenience."

Boston Beer Co., vs. Massachusetts, 97 U. S., 25, and a long line of decisions down to Bown vs. Walling, 204 U. S., 320.

And it is in recognition of the police power, that legislation in the regulation of persons in their conduct and solial relations and in regulation of persons and corporations in the use of property and conduct of business is sustained. It is under this police power that the states prohibit some claimed rights and regulate others. By the police power the states, responsive to the needs of the public and by appropriate legislation, regulate the business of citizens, popular assemblies, public schools, courts and judicial proceedings, the administration of law and many other incidents of government, including the adjustment of her taxing systems.

The Act does not hold appellant responsible for the debt of another as complained, because the tax does not attach until gasoline, kerosene or other product is passing from the vendor to vendee for use on the high-

ways; and in delivery for such use without the tax, the vendor under the terms of the law is consenting to payment of the tax or is conniving with the vendee for evasion of the tax. The Act regulates the sale of gasoline, kerosene and other products for use on the highways only as is necessary to tax such use; and it lays no greater burden on the appellant as a vendor than is necessary in ascertaining, collecting, reporting and accounting for the tax due. And in requiring such vendor to collect, report and pay over such tax there is no denial of due process within the meaning of the State or Federal Constitution, because ample provision exists under the general law for contesting and litigating the claim for the tax in any given case.

II.

Appellant insists that the tax of the Act is a property tax and violates paragraph 5 of Article 16 of the State Constitution, "in that said Act levies an arbitrary tax upon property and not according to its value, and in that said tax is not uniform and equal" (Brief, p. 4).

Appellees conceded in the court below and now concede that the tax laid in the Act can not be sustained under our Constitution as a property tax. But appellees insist that the tax is not laid upon gasoline or other products as such, nor the sale as such; but is laid upon

the use in propelling motor vehicles of combustible type engines upon the highways. Section One of the Act reads:

> "That all persons, firms or corporations who shall sell gasoline, kerosene, or other products to be used by the purchaser thereof in the propelling of motor vehicles using combustible type engines over the highways of this State, shall collect from such purchaser, in addition to the usual charge therefor, the sum of one cent per gallon for each gallon so sold."

Thus it will be seen that the tax is not laid upon gasoline as contended, but is laid on the use in propelling motor vehicles on the highways; and such use for purpose of taxation is measured or determined by the gallons consumed, as a premise for reckoning the tax on a fair and equitable basis.

It will be further noted that the sale of gasoline is not taxed, because the tax obtains only on gasoline or other products used on the highways and is to be paid by the user; and all other gasoline whether sold, given away or retained is exempt from tax. The tax is laid upon the user on the highways; and the vendor is made an agent for the collection of the tax from such user.

The tax is not upon the purchase or ownership because a purchaser may acquire gasoline and other products for any and all other uses without incurring the tax; but under the terms of this Act, the instant

one acquires in this State, by purchase or otherwise, gasoline or other products for propelling motor vehicles of combustible type engines upon the highways the tax applies; and the vendor is enjoined to collect, report and pay over the tax levied by the Act. And such vendor, as agent of the State in such collecting and accounting, is privileged and expected to adopt and apply reasonable rules and regulations for conduct of such business and guidance of the buying public, and such as are necessary for the protection of itself in determining the use to which gasoline and similar products applied for is to be put.

"Statutes are to be construed by ascertaining the legislative intention; and the legislative intention must be inferred from the plain meaning of the words used."

Ricard vs. State, 133 Ark., 1.

"In construing a statute, some meaning should be given to every word contained therein, if possible."

State vs. Embrey, 135 Ark., 262.

"Parts of statutes relating to the same subject must be read in the light of each other."

State vs. Hanna, 131 Ark., 129.

"In construing statutes, each section is to be read in the light of every other section, and the object of the Act is to be considered; and the *intent*

should prevail over inconsistencies."
Rayder vs. Warrick, 133 Ark., 491.

"A statute will be construed as a whole to determine its intent and meaning."
Dobbs vs. Holland, 140 Ark., 398.

When measured by these tests the statute in question clearly reflects intent of the Legislature to lay a privilege tax upon the use of gasoline and other products in propelling motor vehicles of combustible type engines upon the highways, and to graduate or measure such privileged use, for purpose of taxation by the number of gallons so used. Since appellees concede the tax must fall as a property tax, we pass without further notice so much of appellant's argument as is premised upon this contention; and pursue appellees' theory of a privilege tax.

III.

Act 606, in question, is not out of harmony with the Constitution and law applying to privilege taxes; and the Legislature, in its enactment, has recognized the fact that her highways are built by improvement tax laid upon her citizens classified as owners of real estate which burden is to continue indefinitely, that such highways must be maintained in repair for use of all her citizens—owners of automobiles as well as owners of real esate, and that the heavy traffic and

use by automobiles and trucks does most injury and damage to her highways. And to create such a maintenance fund the State by this Act classifies such heavy users and lays this tax to apply to all coming within the classification.

The Arkansas Constitution provides:

> "All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges, in such manner as may be deemed proper."
>
> Const. of 1874, Sec. 5, Art. 16.

In construing and sustaining an Act of 1909 which levied a license tax upon peddlers of lightning rods, steel ranges, clocks, pumps, buggies and carriages, the Arkansas Supreme Court, speaking by Chief Justice McCulloch, said:

> "The Constitution of this State (Art. 16, Sec. 5) provides that 'the General Assembly shall have power, from time to time, to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed necessary. But aside from any express constitutional sanction, as said by Judge Cooley, 'everything to which the legislative power

extends may be the subject of taxation, whether it be person or property or possession, franchise or privilege, or occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the Legislature in its discretion shall at any time select it for revenue purposes.' (Cooley on Tax. 3 Ed., p. 9.) We need not stop, therefore, to consider whether the statute in question imposes a tax for revenue purposes or is merely a police regulation, for the Legislature can exercise either power, and its effect is to impose a license tax on certain privileges. If the statute be found free from objection on the charge of unjust classification, it can be justified either as a police regulation or as a privilege tax imposed for the purpose of rasing revenue. It does not impose a property tax, and is, therefore, not within the constitutional mandate requiring that all property shall be taxed according to is value, and that all taxation shall be equal and uniform." Ex parte Byles, 93 Ark., 616.

It is under this clause of our Constitution that inibertance taxes and the various forms of franchise taxes are laid and uniformly sustained by our courts, though levied for State revenue purposes. In sustaining a Texas statute, Kennedy Act of 1905, which imposed upon all wholesalers of coal oil, naptha, benzine, and all mineral oils an occupation tax of 2 per cent upon the gross sales within the State ,the Supreme Court of the United States said:

"Except as restrained by its own or the Federal Constitution, a state may prescribe any system of taxation it deems best; and it may, without violating the Fourteenth Amendment classify occupations, imposing a tax on some and not on others, so long as it treats equally all in the same class. And on writ of error this court is not concerned with the question of whether the statute attacked as unconstitutional under the Fourteenth Amendment violates the state constitution if the state courts have held that it does not do so."

Southwestern Oil Co. vs. Texas, 217 U. S. 114, affirming 100 Tex. 647.

It is perhaps true, as urged by appellant, that use of the highways is a common law right ancient as the highways; but it is also true that such use by automobiles and heavy motor driven trucks is recent and modern as such vehicles are recent and modern. It is demonstrated by the experience and history of all civilizations that conditions and relations are constantly shifting and changing as progress and development and world contact may eventuate. And it is for this very reason that the police and taxing power is inherent and has no limitation save that specifically expressed in the Constitution of the sovereign government. In the effort to establish and maintain her highways, the state may exercise her inherent and sovereign power of taxation in any way and all ways not prohibited by the State or Federal Constitution; and acting through her Legisla-

ture may classify the uses of her highways, and tax certain of said uses as a privileged use. This she has done by Act 606, and in language sufficiently clear that the court is not called upon to read anything into the Act by inference or implication. And we insist that the Act does not contravene any common-law right of appellant either as a vendor of gasoline or as an user thereof on the highways.

It is argued with apparent earnestness that the tax levied can not be a privilege tax because the Act carries no clause *declaring the use of the highways to be a privilege*, and because no penalty is prescribed for abuse or unlawful use of the privilege. (Brief, 4.) Though we doubt the sincerity of this contention, we reply that the highways are the property of the State and her various counties, are created and maintained for public use, subject to such restriction and regulation as may be prescribed by law. Act 606 is a restricting and regulating tax measure; and does not require a preamble or clause *declaring the use of the highways to be a privilege*. We further answer that one who would make use of the highways in motor vehicles of combustible type engines without paying the tax is penalized by inability to purchase gasoline for such use, because by provision of Section One it is the duty of vendors to "collect from

such purchaser, in addition to the usual charge therefor, the sum of one cent per gallon for each gallon so sold." And should a purchaser for such use decline to pay the tax, the vendor should refuse to sell. Section 2 of the Act requires report of gasoline or products sold for such use, and payment of the tax into the county treasury; and should the vendor fail to collect said tax or connive with the purchaser for evading the tax, such vendor is subjected to personal liability for the same. And under provisions of Section 6 the vendor is not only required to make report of sales and account for such tax, but he is penalized for a failure in either duty by subjection to the tax and a fine of not less than "ten nor more than one thousand dollars." We, therefore, submit that such privileged user of the highways is deprived of gasoline or other products for such privileged use unless he pays the tax; and the vendor is penalized for conniving with such user for evasion of the tax.

IV.

Appellant complains that the *Act is void for uncertainty*, that purchasers in evasion of the tax may fraudulently obtain gasoline and other products for such use; and submits a hypothetical case in argument. (Brief, 7 and 8.) To this argument we answer that no law is to be tested by a hypothetical case or any ex-

treme situation. We further reply that under the Federal Constitution, Congress alone may pass laws regulating interstate commerce and intercourse; but because this is so, is no argument that the State may not tax a given privilege within her borders when exercised by those subject to her tax jurisdiction. While the Attorney General for the State admits it to be possible that evasions are possible in border cities and otherwise as suggested in appelant's hypothetic case, he in no sense admits that such possible evasions are necessarily the fault of the law; but, on the contrary, contends that by the terms of the Act all vendors of gasoline and products for such use on the highways are made the State's agents for the collection of such tax. And that under police power inherent in every sovereign, the State may rightfully say to the resident and nonresdient vendor, if you sell gasoline and other products in Arkansas for such use on her highways, you must collect, report, and pay over the tax on such use. It may be true, as suggested in appellant's hypothetic illustration, that the law is defective, in that it is possible for some to evade the payment of this tax; but this is true of all tax laws, and does not necessarily cut down the Act as unconstitutional. The fact that there are possibilities for evasion, or even instances of evasion, is

an argument for amendment and strengthening of the law so as to preclude such evasion; but it is surely no argument for declaring the law unconstitutional. Experience in legislation discloses that laws come into existence responsive to needs of the people, and all statutes are a process of evolution within constitutional limitations, being strengthened and amended from time to time as administration of the law points the necessity; and the courts may safely trust the legislative agency to so amend this law within the limitations of the State and Federal Constitutions as construction by the courts and experience and administration of the law points the way. This objection of appellant's hypothetic case addresses itself to the Legislature rather than to the judiciary; and the question here is not whether it is possible for some persons to evade the tax, but whether the tax as laid is within constitutional limitations:

> "Any act which manifests a design that any particular provision shall be the law is a sufficient enactment."
>
> Wood vs. Wood, 54 Ark., 172, and
> State vs. Corbett, 61 Ark., 226.

Act 606 defines the duties of vendors of gasoline and similar products for use on the State's highways and it is practical for such vendor to ascertain the intended

use when applied for, and thus hedge against the subjection to tax on gasoline and products for such use fraudulently obtained—

> "A law providing that if any clerk shall knowingly and willingly do any act contrary to the duties of his office or fail to perform any act or duty required of him by law, he shall be deemed guilty of misdemeanor in office, on conviction shall be removed from office, is not open to objection of vagueness."
>
> Howard vs. State, 72 Ark., 586.

The privileged user who fraudulently obtains gasoline an other products for such use on the State's highways may be subjected to the tax on such use under the general laws; and the vendor under Act 606 is required to make report of all sales of gasoline and similar products so that the State may police their uses. And it is only when such vendor negligently or wilfully connives with a purchaser for such evasion that he incurs the penalties of the Act. The vendor's duty to collect, report and pay over is made definite and certain by the terms of the Act; and we submit that the Act is neither vague nor uncertain. If the vendor in good faith wants to comply with this law, he may require of every applicant for purchase of gasoline or other product suitable for such use on the highways, a signed declaration of the use to which same is to be

put. And should the applicant demur thereto and refuse payment of the tax, the vendor not only may, but *should*, require such signed declaration, showing date and number of gallons sold, and the use designated; and if some such reasonable and necessary regulation be adopted by the vendor, the courts will uphold and protect him therein. The gasoline is in the hands of the vendor, and in obedience to this law he may and should say to the would-be purcaser, there is a tax on certain use of this article and if you buy for this use I am required to collect same, report and pay it over. And if you buy it for a tax-free use, you must leave with me a signed declaration of that use, so I may report and protect myself. And if the applicant declines to pay the tax and declines to file a declaration of a tax-free use, the vendor may decline to sell; and upon such refusal the product is still in the hands of the vendor and no tax has attached. It may be argued that dishonest purchasers would make false declarations in evasion of the tax; but a law is not unconstitutional or to be condemned because some persons subjected thereto may be dishonest. Neither would a vendor of gasoline be held criminally or in an action at law for a tax accruing on the use of a product thus fraudulently obtained, unless by connivance or otherwise he partici-

pated in such fraud. There is no uncertainty or indefiniteness in the terms of this law—the tax is laid definitely and certainly upon use of gasoline and other products used in motor-driven vehicles of combustible type engines upon the State's highway and accrues against the user at the instant of purchase. If the purchaser files with the vendor a false declaration of the product's use, the fraud attaches to the purchaser and not to the vendor. It is true the law does not require a written declaration of use by the purchaser, nor is such provision necessary, because the vendor has an inherent right to adopt rules in conduct of his business which are necessary for his protection in conforming to the law; and the presumption always obtains that he will do so. The Act is definite and certain in requiring the vendor to report sales, collect and pay over the tax; and no liability or penalty attaches, except upon default in one or more of their duties. And we submit that the authorities cited by appellant on this contention reflect utterances of the court in construction of statutes which were open to objections not found in Act 606.

Appellant professes uncertainty as to where the tax is laid; and insists that "the court below inter-

preted the Act to be a tax on the privilege of selling gasoline." (Brief, 4.)

In reply we quote the finding of the courts below:

> "And the court being now well and sufficiently advised as to the issues of fact and of law herein, doth find that Act No. 606 of the General Assembly of Arkansas, approved March 3, 1921, is not a property tax but is a privilege tax, and as such is not repugnant to either the Constitution of Arkansas or the Constitution of the United States." (Tr., 11 and 24.)

It is true that the first decree does not state what privilege is taxed; but the U. S. Circuit Court of Appeals held it to be a tax upon the privilege of making sales (Tr., p. 21) and the appellant made the same attack and contentions in the lower courts as he makes here. And appellees there, and here, admitted the Act could not be sustained as a property tax and that it could only be sustained as a tax upon the privileged use of the State's highways and guaged or measured by gasoline and other products consumed in such use or a tax upon the sale for such privileged use. No other contentions were before the Court; and in the light of the court's language under these circumstances it is fair to presume, and we think clearly reflected in the record, that the court below interpreted the Act to be a tax upon the privileged use of the State's highways or upon

sales of gasoline for such privileged use. Such was the State's contention as reflected by her argument in briefs in the lower courts; and such is her contention now, because the language of the Act is not susceptible of any other construction.

Before submitting our analysis of the Act, we invite this court's attention to the following rules of interpretation and construction as adopted and announced by the courts:

> "The language of a statute should be fairly and rationally interpreted, so as to carry out the legislative intention; and if it is susceptible of two constructions, one of which will lead to an absurdity and the other not, the latter will be adopted."
>
> State vs. Jones, 91 Ark., 5; also
> McDaniel vs. Hearn, 120 Ark., 288.

> "An intent to give extra-territorial effect to a statute will not be ascribed to the lawmakers unless the language employed affords no escape from such construction."
>
> Leanord vs. State, 95 Ark., 381.

> "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."
>
> Hooper vs. California, 155 U. S., 647, citing
> 3 Peters, 443; 12 Peters, 72; 14 Peters, 178; 112 U.S., 261, and 116 U.S., 252.

The Act in question, as shown on its face and contended by appellees, levies a specific and definite PRIVI-

LEGE TAX upon all USERS of gasoline or other products consumed in propeling motor vehicles of combustible type engines over the highways of this State; and lays same as a burden upon the consumer for the PRIVILEGE OF SUCH USE ON STATE'S HIGHWAYS. The Act does not tax gasoline as property, but does tax its use on the highways at the rate of one cent (1c) per gallon; and lays same as a burden upon all who get such privileged use and benefit of the State's highways. Section 1 of Act.

It requires all persons making sales to purchasers for such use to register with the County Clerk and to file with him on or before the tenth of each month an itemized and verified statement showing such sales and the tax thereon for the preceding month; and to pay into the county treasury the amount. Section 2 of Act.

It requires all wholesalers to file with the County Clerk on or by the tenth of each month a verified statement showing distribution to each retailer within the county during the preceding month. Section 4 of Act.

It requires the County Treasurer to make monthly report of tax payments and enjoins upon the County Judge an inspection of said report and a distribution of the tax—one-half to the county road fund and one-

half to the State Highway Improvement Fund. Section 5 of Act.

In further argument we can do no better than to submit our brief as offered in the court below.

1. *Does the Act contravene Section One of Fourteenth Amendment to the Federal Constitution and Section Eight of Article Two of the State Constitution, as alleged?*

The clause of Fourteenth Amendment here invoked reads:

> "No State shall abridge the privileges or immunities of citizens of the United States. * * * Nor shall any State deprive any person of life, liberty, or property without due process of law."

And the clause of the State Constitution referred to reads:

> * * * "Nor be deprived of life, liberty or property without due process of law."

The Act does not hold the appellant for the debts of another, but simply regulates the sale of gasoline for use on the highways by requiring the vendor to collect such tax from the purchaser. Neither does the Act subject appellant to fine for the act of another, committed without appellant's connivance, consent or

participation, because in making such sales and failing to collect the tax required the vendor would be consenting and conniving with the purchaser for evasion of the tax in violation of the terms of the law. Neither does the Act deprive appellant of property and appropriate same to use of another as alleged, because the tax is laid on appellant's purchaser for privileged use on the highways, and nowhere falls upon property of the appellant as vendor, nor is appellant's property taken for another. But the taking of property by the State is not denied under these constitutional provisions when done under due process of law.

What is due process of law?

> "Due process of law has never been precisely defined. While its fundamental requirement is opportunity for hearing and defense, the procedure may be adapted to the case; and proceedings in court are not always essential. The laws of a State come under the prohibition of the Fourteenth Amendment only when they infringe fundamental rights."
>
> Ballard vs. Hunter, 204 U. S. 241, affirming 74 Ark., 174, St. Francis Levee Tax.

> "Due process of law requires, in judicial proceedings, a court having jurisdiction over the subject matter and also over the person or property to be affected by the judgment."
>
> Pennoyer vs. Neff, 95 U. S. 714-733.

"The words 'due process of law,' in the Fourteenth Amendment, do not necessarily require an indictment."

110 U. S., 516.

"The provision in Fourteenth Amendment that no State shall deny to any person the equal protection of the laws does not prevent a State from adjusting its taxing system in all reasonable ways or compel the State to adopt an iron rule of equal protection."

Bell's Gap Ry. Co. vs. Pennsylvania, 134 U. S., 232.

"The discriminations which are open to objection under some inhibitions are those where persons engaged in the same business are subject to different restrictions or are held entitled to different privileges under the same conditions."

Soon Hing vs. Crowley, 113 U. S., 703, affirming California Supreme Court (Laundry Case).

"Section One of the Fourteenth Amendment means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same and under like circumstances."

Missouri vs. Lewis, 101 U. S., 22 (and many cases there cited), involving revocation of attorney's license.

"A citizen of another State receives equal protection of the laws of a State when the State law is impartially administered with its benefits and

obligations in a matter which is within the State's control."

Eldridge vs. Treevant, 160 U. S., 452, affirming Louisiana Supreme Court.

"A State statute which affords opportunity in a suit at law for collection of a tax, to judically contest the validity of the proceeding, does not deprive of property without due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution."

Kentucky Railroad Cases, 115 U. S., 321, Taxing Statute.

"A State law which provides for the impartial application of the same means and methods to all constituents of each class, so that the law shall operate equally an duniformly on all persons in similar circumstances, denies to no person affected by it equal protection by the law within the meaning of the Fourteenth Amendment to the Constitution of the United States."

Kentucky Railroad Cases, 115 U. S., 321, Taxing Statute.

"The Constitution contains no definition of the word 'deprive' as used in the Fourteenth Amendment. To determine its significance it is necessary to ascertain the effect which usage has given it when employed in the same like connection. Down to the time of adopting the Fourteenth Amendment, it was not supposed that statutes regulating the use or even the price of private property necessarily deprived an owner of his property without due process of law. The Fourteenth Amendment does not change the law in this

particular; it simply prevents the States from doing that which will operate as such a deprivation."

Munn vs. Illinois, 94 U. S., 123 (Warehouse Case).

"A State statute for raising revenue which requires statement to a designated official for receiving statement, and which affords opportunity in a suit for collection to judicially contest, does not deprive of property without 'due process' within the meaning of Fourteenth Amendment."

Kentucky Railroad Tax Case, 115 U. S., 321.

"If the laws enacted by a State be within the sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law."

Mo. Pac. Ry. Co. vs. Humes, 115 U. S., 520; also In Re Kemler, 136 U. S., 448 (statute of double damage in Missouri).

"A State law of New York in levying tax of one per cent upon the shares of stockholders of all banks and banking associations, and in requiring such banks to collect from their shareholders and pay over such tax to the county treasurer, and penalizing such banks to the extent of the tax and $100.00 per day for each day of delay in failure to collect and pay over, does not contravene the Federal Constitution and law, and is not discriminatory."

New York vs. Amoskeag Sav. Bk. vs. Purdy, 231 U. S., 373.

"A State tax upon interest-bearing deposits requiring the bank to pay and charge to depositor, relieving the depositor from making any return on his interest-bearing deposits, does not unfairly discriminate against banks."

Clement Natl. Bk. vs. Vermont, 231 U. S., 120.

"Kentucky statute requiring banks to list its shares of stock for taxation, and further requiring it to pay such tax and charge to the shareholder, and holding the banks for a penalty in default (of either duty) does not operate to discriminate against the banks contrary to Federal law nor deny due process."

Citizens Natl. Bk. vs. Kentucky, 217 U. S., 443.

"A State statute which prohibits a safe deposit company from permitting removal of the contents of a box after death of the renter without retaining sufficient assets to pay inheritance tax and penalizing to extent of the tax and one thousand dollars additional, does not deprive of property without due process of law nor arbitrarily burden with liability."

Natl. Safe Dep. Co. vs. Stead, 232 U. S., 58.

This was an inheritance law of Illinois, approved July 1, 1909, and in Section 9 thereof provided:

"No safety deposit company, corporation or person having in possession or control securities or assets belonging or standing in the name of a decedent or in the joint name of a decedent and another person, or in the name of a partnership of which deceased was a member, shall deliver such assets to

> the legal representative of the deceased or to the survivor of the joint holder, or to the partnership of which he was a member, without ten days' notice to the Attorney General and Treasurer of the State who are authorized to examine the securities at the time of delivery. It is further provided no delivery shall then be made without written consent of such State without retaining a sufficient portion to pay the State tax thereafter assessed. And failure to give notice and retain such amount shall render such safety deposit company liable to the tax and a fine of $1,000.00."

And after a vigorous attack in the case above cited, the act was sustained affirming the judgment of the Illinois Supreme Court.

The Act 606, here attacked, fixes the time when all vendors of gasoline to purchasers for use on highways shall make report of sales and of tax collected, and designates the parties to whom report and payment is made, and the means for knowing the sales and the amount of tax are definite and certain; and there is no depriving of property or punishment to appellant without its connivance, consent and participation with taxpayers in evasion of law, nor is there lack of due process.

> "The statute, by fixing the time the bank shall make report of its shareholders and the tax thereon, and directing the Auditor General to hear any stockholder who may desire to be heard, provides 'due process of law.' "

Mer. and Mfrs. Bk. vs. Pennsylvania, 167 U. S., 461.

"The privileges and immunities of citizens of the United States are not unconstitutionally abridged, nor junk dealers denied equal protection of the law by the provisions of a New York statute of 1903, Chap. 326, which, as construed by the highest court of that State, make it a criminal offense for a junk dealer to buy or receive stolen wire, cable, copper, lead, solder, iron or brass used by or belonging to a railroad, telegraph, telephone, gas or electric company without making a diligent inquiry to ascertain whether the seller has a legal right to sell."

Rosenthal vs. New York, 226 U. S., 260.

"The making of a national bank the agent of the State for collecting the tax upon stock of its shareholders is a mere matter of procedure; and there is no discrimination against the national banks in the fact that the State banks are not so compelled because the Auditor General looks to their stockholders directly."

Mer. and Mfrs. Bank vs. Pennsylvania, 167 U. S., 461.

"The constitutionality of a State statute in relation to taxation is to be determined not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid."

Section 288, page 1624, Vol. 2, Digest of U. S. Ct. Reports, and cases there cited.

"In Crandall vs. State of Nevada, 73 U. S., 35, the State had passed a law requiring those in charge of all the stage coaches and railroads doing

business in the State to make report of every passenger who passed through the State or went out of it by their conveyances, and to pay a tax of one dollar for every such passenger. The argument was there urged that the tax was laid on the business of the railroads and stage coach companies; but the court said, as in the passenger cases, that it was a tax which must fall upon the passenger and be paid by him for the privilege of riding through the State by the usual vehicles of travel."

"And in the case of the State Freight Tax, 82 U. S., 232, the court said the inquiry is upon what does the tax really rest, and not upon the question from whom the State exacts payment."

Cook vs. Pennsylvania, 97 U. S., 571.

"Legislation is not open to the charge of depriving one of his rights or property without due process of law, if it be general in its operation upon the subject to which it relates and is enforceab'e in the usual modes established in the administration of government with respect to kindred matters—that is, by process and proceedings adapted to the nature of the case, and such is the Act of West Virginia in question."

129 U. S. 114, affirming the Supreme Court of West Virginia in regulating practice of medicine and licensing thereto.

We submit that Act 606 is within the legitimate sphere of legislative power as defined by the State Constitution, her Supreme Court and the Supreme Court of the United States.

"The State's ancient right of eminent domain and of taxation is herein fully and expressly con-

ceded; and the General Assembly may delegate the taxing power, with necessary restriction, to the State's subordinate political and municipal corporations, to the extent of providing for their existence, maintenance and well being, but no further."

Section 23, Article 2, Constitution of 1874.

"The State Constitution is not a grant of enumerated powers; and the Legislature may rightfully exercise its legislative powers, subject only to the limitations and restrictions fixed by the Federal and State Constitutions."

St. Louis, Iron Mtn. Ry. vs. State, 99 Ark., page 1.

Butler vs. Fourche Drainage Dist., 99 Ark., 100.

"The constitution is the paramount law to which all other laws must yield, and is the measure of the rights and powers of the Legislature."

Marvin vs. Fussell, 93 Ark., 336.

"The Legislature has power to make such laws as are not expressly or by necessary implication prohibited by the Constitution."

McClure vs. Topf & Wright, 112 Ark., 342.

"The right to tax is sovereign, is indispensible to all governments; and while it may be restricted by the Constitution, this right needs no clause to confer it."

Ouachita County vs. Rumph, 43 Ark., 527.

"The Federal Constitution is an enumeration of powers granted by the people and the States to Federal control; and the State Constitu-

tion is a Bill of Rights imposing duties and restrictions upon the government and the people."

State vs. Ashley, 1 Ark., 513;
Pulaski County vs. Irwin, 4 Ark., 473, and a long line of decisions in harmony.

"The power to impose taxes is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation, to every object of industry, USE, or engagement, to every species of possession, and it imposes a burden which, in case of failure to discharge, may result in seizure and sale or confiscation of property."

Cooley's Const. Lim., 6 Ed., 587; also Kirtland vs. Hotchkiss, 100 U. S., 491.

"The Fourteenth Amendment to the Constitution does not limit the subject in relation to which the police power of the State may be exercised for the protection of its citizens."

129 U. S., 26, affirming the Iowa Supreme Court, sustaining an Iowa statute subjecting railroads to double value of stock killed where track not fenced, on failure to pay within 30 days after notice.

"The tax power of the State is one of its highest attributes of sovereignty, and is essential to its continued existence. It is not derived from, but exists in the States independently of the Federal Constitution, and may be exercised to an unlimited extent upon all property, trades, business avocations and privileges carried on within the territorial boundaries of the State, except so far as

it has been surrendered to Federal government, either expressly or by necessary implication—subject to restriction of the State Constitution."

Picard vs. East Tenn. Ry. Co., 130 U. S., 641.

"The presumption of constitutionality following taxing statutes is stronger than applies to law generally, and only where the taxing system clearly and palpably violates the fundamental law will a taxing statute be held invalid."

Bridge vs. Henderson City, 183 U. S., 592.
Also—

171 U .S., 404.
174 U. S., 754.
184 U. S., 540.
183 U. S., 479.

"Everything to which legislative power extends may be the subject of taxation, whether it be person, property, possession, franchise, PRIVILEGE, occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude from the grasp of the taxing power if the Legislature in its discretion shall select it for revenue purposes."

Cooley on Taxation, 2 Ed. 5; also
Clark vs. Kansas City, 176 U. S., 119.

"When the State Legislature has declared that the policy of the State requires a certain measure, it should not be disturbed by the courts under the Fourteenth Amendment, unless it is clearly seen that the law should be extended to classes left untouched."

M. K. & T. Ry. Co. vs. May, 194 U. S., 267.

and Williams vs. Ark., 217 U. S., 79, affirming 85 Ark., 470, in Hot Springs drumming cases.

"The police powers of the State extend to all things essential or necessary to the safety, health an dcomfort and morals of citizens, and the States have been upheld in every form of taxation and regulation for the public good without the constitutional limitation as illustrated by the Warehouse Cases in:

Munn vs. Ill., 94 U. S., 179.

The Mining Cases from Arkansas and Utah.

McLean vs. Williams, 211 U. S., 539, affirming Arkansas Supreme Court, 81 Ark., 304 (Coal Screening Act).

Holden vs. Hardy, 169 U. S., 366, affirming Supreme Court for State of Utah.

"The privilege of drumming on premises of common carriers for hotels, lodging houses ,eating houses, bath houses, physicians, masseurs, surgeons and medical practioners may be singled out and denied by Arkansas statute of April 30, 1907, without denying equal protection of the laws to the business and professions therein mentioned.

Williams vs. Arkansas, 217 U. S., 79, affirming 85 Ark., 470.

"The Fourteenth Amendment to the Constitution does not impair the police power of a State."

California Laundry Cases, 113 U. S., 27 and 703, affirming the California Supreme Court.

"The Fourteenth Amendment to the Constitution was not designed to interfere with the ex-

ercise of the police power by the State for the protection of health, the prevention of fraud and the preservation of public morals and comforts."

Powell vs. Pennsylvania, 127 U. S., 678.

"The police power of a State is as broad and plenary as the taxing power (as defined in Coe vs. Escol, 116 U. S., 517, tax on logs in New Hampshire); and property and persons within the State are subject to the operation of the former so long as within the regulating restriction of the latter."

Kidd vs. Pearson, 128 U. S., 1 (involving prohibition of the manufacture and sale of liquors).

"A State statute or regulation requiring engineers and other persons employed by a railroad in a capacity which calls for ability to distinguish and discriminate color signals to be examined in this respect from time to time at the expense of the company; and prescribing a penalty of not less than $50.00 nor more than $500.00 for employment without examination, is a proper exercise of police power, and does not deprive of property without due process of law."

Nashville, Chattanooga and St. Louis Ry. vs. Alabama, 128 U. S., 82.

"It is the duty of the court in testing the validity of a given statute or regulation in exercise of the police power to resolve all doubts in favor of the legislative action; and to sustain it unless it appears to be clearly outside the scope of reasonable and legitimate regulation."

Williams vs. Arkansas, 217 U. S., 79, affirming 85 Ark., 464.

"Under the powers inherent in every sovereign, a government may regulate the conduct of its citizens toward each other, and when necessary for the public good the manner in which each shall conduct his business and use his property. When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use and must to the extent of such use and interest submit to be controlled by the public for the common good so long as he maintains that use. Rights to property and to a reasonable compensation for its use can not be taken away without due process; but the law, as a rule of conduct, may be changed at the will of the Legislature.

Munn vs. Illinois, 94 U. S., 113.

"The charted right of a corporation to do business does not operate to deprive the State of its police power; and the franchise to do business is qualified by the duty to do so conformably to lawful and proper police regulation then existing and thereafter to be enacted."

Hammond Packing Co. vs. Arkansas, 212 U. S., 322, affirming 81 Ark., 519.

"Nothing in the Fourteenth Amendment imposes any ironclad rule upon the States with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the irregularity is not based upon arbitrary distinctions."

St. Louis S. W. R. R. vs. Arkansas, 235 U. S., 273, affirming 106 Ark., 321.

"State legislation which, in carrying out a public purpose, is limited in its application, is not

a denial of equal protection of the laws within the meaning of the Fourteenth Amendment, if within the sphere of its operation it affects alike all persons similarly situated."

Barber vs. Conaly, 113 U. S., 27, and Williams vs. Arkansas, 217 U. S., 89, affirming Arkansas Supreme Court.

We, therefore, submit that the tax laid in Act 606 is not a property tax laid upon the plaintiff as a vendor of gasoline, but is a privilege tax laid upon the purchaser and consumer of gasoline on the highways or upon the sale for such privileged use, that the act itself levies the tax and does not delegate to appellant the power to levy as alledged, and that the act does not contravene Section 1 of the Fourteenth Amendment nor Section 18 of Article 2 and Section 23 of Article 2 of the State Constitution, as alleged.

Does Act 606 contravene Section 5 of Article 16 of the State Constitution as alleged?

"All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers,

ferries, exhibitions and PRIVILEGES in such manner as may be deemed proper."

Section 5 of Article 16 of Constitution.

"The Legislature may impose a privilege tax on certain callings, uses or trades, and a privilege tax is uniform if it bears equally upon all persons belonging to the class upon which it is imposed."

Byles Ex Parte, 93 Ark., 612.

"The rule of uniformity in taxation requires uniformity in the rate of taxation and in the mode of assessment. There must be an equality of burden. The uniformity must be co-extensive with the territory to which it applies, whether it be the State, a county, township, city, town or district."

Fletcher vs. Oliver, 25 Ark., 289.

"A tax on foreign and domestic corporations doing business in the State, for the privilege of exercising franchise therein, is not in violation of Article 16, Section 5 of the Constitution requiring that all taxes shall be equal and uniform, since the privilege of exercising a corporate franchise is not property within the meaning of the constitutional requirement."

St. Louis S. W. Ry. Co. vs. State, 106 Ark., 231, and later on appeal affirmed in the U. S. Court, 235 U. S., 265.

"In determining the propriety of a classification made by the Legislature for the purpose of taxing or regulating privileges or occupations, it is the duty of the courts to uphold the legislative determination unless the classification is clearly unreasonable and arbitrary—the Legislature being primarily the judge as to that."

Byles Ex Parte, 93 Ark., 612.

"Inheritance taxes are not laid upon the property, but upon the privilege or right of succession thereto; and not subject to the same tests with respect to equality and uniformity as taxes levied upon property."

State vs. Handlin, 100 Ark., 549.

"The Legislature has power to authorize cities to impose a tax upon the privilege of driving vehicles upon the public streets; and such act does not contravene Section 5 of Article 16 of the Constitution because not a tax upon property, but a privilege tax. Nor is the act void as discriminating in favor of those who dwell outside of the city."

Fort Smith vs. Scruggs, 70 Ark., 549.

"Taxing memberships in an incorporated chamber of commerce does not deny the member equal protection of the law guaranteed by the Fourteenth Amendment, because the State statute exempts from such taxation the members of an associated press, lodges, fraternal orders, churches, etc."

Rogers vs. Hennefin County, 240 U. S., 184.

"The power of the Legislature in establishing different methods of taxation for different persons and property, is that of classification, and such power is recognized on all hands; but the extent of the power depends upon the meaning of classification. The right to classify is not the right to act arbitrarily, or to deprive persons of the most fundamental sorts of protection accorded to persons generally. Classification means only the division of persons or properties into different classes on some basis or principle that from its own nature, and from the nature of the persons or properties

classified, affords a reasonable and just ground for the different treatment of the different classes."

Gulf, Col. and Santa Fe Ry. vs. Ellis, 165 U. S., 150.

"The basis of classification must be natural and not arbitrary."

Gulf, Col. and Santa Fe Ry. vs. Ellis, 165 U. S., 150.

"Classification of the subject of taxation is necessary to secure true uniformity and equality of taxation, and the requirements of the Federal Constitution have been fulfilled if the rates, though different for separate classes, operate uniformly on each class.

Cincinnati, N. O. T. P. R. R. Co. vs. Kentucky, 115 U. S., 321; also

Sections 300 to 336 of Vol. 2, Dig. of U. S., Sup. Ct. Reports, page 1624 *et seq.*

"The business of the person or his property is to be classified for taxation with reference to the entire business and use, rather than by comparison with some other business or property which is engaged, in part in, or in part of, the same business."

Am. Sugar Refining Co. vs. Louisiana, 179 U. S., 95, and

Cook vs. Marshall Co., 196 U. S., 274.

"The State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion."

Merchants Natl. Bk. vs. Pennsylvania, 167 U. S., 461; also

115 U. S., 321.

134 U. S., 594.

165 U. S., 150.
184 U. S., 329.
179 U. S., 89.
179 U. S., 279.
142 U. S., 386.
185 U. S., 364.
188 U. S., 730.
196 U. S., 269.
196 U. S., 608, and
194 U. S., 621.

"And it is enough that there is no discrimination in favor of one as compared with another of the same class."

Gulf, Col, and Santa Fe R. R. vs. Ellis, 165 U. S. 155; also
101 U. S., 22.
113 U. S., 27.
52 U. S., 377.
134 U. S., 232 and 594, and
142 U. S., 339.

"The Federal Constitution permits classification for purpose of taxation and permits the application of different rules of assessment, valuation and review thereof to different classes; and permits different rates thereon. It is sufficient that under the system proposed all persons within the same class are treated alike, and that there is no discrimination in favor of one as compared with another of the same class.

Bell's Gap Ry. vs. Pennsylvania, 134 U. S. 232; also
Adams Express Co. vs. Ohio, 165 U. S., 228.
Magoun vs. Illinois Tr. and Savings Bk., 170 U. S., 283, and
Billings vs. Ilinois, 188 U. S., 97.

"Classification of the subject of taxation is necessary to secure true uniformity and equality of taxation; and the requirements of the Federal Constitution have been fulfilled if the rates, though for separate classes, operate uniformly on each class."

Cincinnati, N. O. & T. Pac. Ry. Co. vs. Kentucky (R. R. Tax Cases), 115 U. S., 321, and many cases there cited.

"No unconstitutional discrimination is made by sustaining the Tennessee merchants' tax on a corporation dealing only in goods manufactured from the produce of other States, because Section 30 of Article 2 of Tennessee Constitution provides, 'No article of the produce of this State shall be taxed otherwise than to pay inspection fees, where the highest court of the State has held that this provision refers only to a direct levy of taxation upon articles manufactured from the produce of the State and that the merchants' tax applies equally to all merchants.' "

Am. Steel and Wire Co. vs. Speed, 192 U. S., 500.

"Meat packing houses are not denied the equal protection of the laws by a tax imposed on their business under Chapter 247 of N. C. laws of 1903, because houses packing vegetables and the like are not included in the same classification and subjected to the same tax."

Armour Packing Co. vs. Lacy, 200 U. S., 226.

"A State statute laying a tax upon the business of express companies does not deny to them the equal protection of the laws because it does

not impose a like tax upon railroad, canal or steamboat companies which carry express matter."

Pacific Exp. Co. vs. Seibert, 142 U. S., 339, and the many cases cited therein.

"The Federal Constitution gives no right to challenge a tax law upon the sole ground of the inequalities of the burdens imposed by the law."

Mers. and Mfrs. Natl. Bk. vs. Pennsylvania, 167 U. S., 461, and the many cases there cited.

"The Fourteenth Amendment to the Federal Constitution does not prevent the classification of property for taxation, subjecting one kind of property to a different rate or distinguishing between franchise, license and privilege and visible and tangible property, and between real and personal property."

Home Ins. Co. vs. New York, 134 U. S., 594, and many cases there cited.

"The Fourteenth Amendment was not intended to compel the States to adopt an iron rule of equality of taxation or to prevent the classification of property for taxation at different rates, or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be attained by it." It is enough that there is no discrimination in favor of one as against another of the same class."

Giozza vs. Tierman, 148 U. S., 657.

"Equality of operation of statutes does not mean indiscriminate operation on persons merely as such, but on persons according to their relations."

Magoun vs. Illinois Tr. and Sav. Bk., 170 U. S., 283.

"Assessments which are imposed equally upon all standing in like relation are uniformly within the constitutional requirement."
Cribbs vs. Benedict, 64 Ark., 555, 570.

Is Act 606 Repugnant to Section 18 of Article 2 of the State Constitution as Alleged by Appellant?

Appellant complains that the act contravenes this provision because those who use gasoline in combustible type engines on the highways of the State are subject to the tax, while those using wagons and other vehicles upon the highways are not subjected thereto. And that persons purchasing gasoline outside of the State consume the same in propelling motor vehicles of combustible type engines upon the highways without payment of such tax while those who purchase within the State for such use are subjected to the tax. And in response to these complaints appellees reply:

1. Appellant, Pierce Oil Corporation, is a corporation and is not within the provisions of Section 18 of Article 2 of the State Constitution nor of Section 2 of Article 4 and Section 1 of the Fourteenth Amendment to the Federal Constitution.

See—

Waters Pierce Oil Co. vs. Hot Springs, 85 Ark., 514.

Chicago, Rock Island and Pacific Ry. Co. vs. State, 86 Ark., 423.

St. L., I. M. & S. Ry. Co. vs. Board of Levee Dist., 103 Ark., 158.

State vs. Southern Sand and Material Co., 113 Ark., 159.

Pembina Mining Co. vs. Pennsylvania, 125 U. S., 181.

Orient Insurance Co. vs. Daggs, 172 U. S., 557.

Western Turf Assn. vs. Greenberg, 204 U. S., 359.

2. That appellant, Pierce Oil Corporation, is not unlawfully discriminated against because it is in operation of motor vehicles upon the highways of the State subjected to a tax upon gasoline consumed in such vehicles, while persons using other vehicles upon the highways of the State are not so taxed.

Use of the highways by motor vehicles is a privilege and such privileged use may be taxed.

"The General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper."

Section 5 of Article 16 of Constitution of 1874.

* * * "Inheritance taxes are not laid upon property, but upon the privilege or right of suc-

cession thereto, and are not subject to the same tests with respect to equality and uniformity as taxes levied upon property."

State vs. Handlin, 100 Ark., 175 (Kirby).

"The Act of March 26, 1901, providing 'that cities of the first class are hereby authorized to require residents of such city to pay a tax for the privilege of keeping and using wheeled vehicles,' is not invalid, as the Act authorizes not a property tax, but a tax on the privilege of using the streets of the city."

"The Legislature has power to authorie cities to impose a tax upon the privilege of driving vehicles upon the public streets."

And Section 5 of Article 16 of the Constitution of 1874, providing that "all property subject to taxation shall be taxed acording to its value," and in such manner as to make the value "equal and uniform throughout the State" applies only to property and not to privilege taxes."

Fort Smith vs. Scruggs, 70 Ark., 549 (Riddick).

"Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise or privilege, occupation or right. The Legislature may impose a privilege tax on certain callings or trades without taxing other trades or callings, and a privilege tax is uniform if it bears equally upon all persons belonging to the class upon which it is imposed."

Ex Parte Byles, 93 Ark., 612 (McCulloch).

"It is doubtless true that the Legislature could not arbitrarily select certain citizens upon whom to impose the tax, while exempting others in like situation, but the rule of equality only requires that the tax shall be collected impartially from all persons in similar circumstances."

Fort Smith vs. Scruggs, 70 Ark., 549 (Riddick).

By the terms of Act 606, persons who exercise the privilege of propelling motor vehicles with combustible type engines upon the State's highways are grouped as a class and are taxed one cent per gallon for gasoline purchased for such consumption; and all prsons who fall within that class are subjected to such tax.

"Legislation pertaining merely to members of a class, such as owners of automobiles, is not a denial of the equal protection of the laws where it affects alike all persons of the class affected."

Helena vs. Dunlap, 102 Ark., 131 (Hart).

"It is the duty of the court, in testing the validity of a statute, to resolve all doubts in favor of the legislative action and to uphold it unless it is clearly an abuse of legislative power. And in determining the propriety of a classification made by the Legislature for the purpose of taxing or regulating privileges or occupations, it is the duty of the courts to uphold the legislative determination unless the classification is clearly unreasonable and arbitrary—the Legislature being primarily the judge as to that."

Ex Parte Byles, 93 Ark., 612 (McCulloch).

"Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

United States vs. Delaware and Hudson Co., 213 U. S., 366, 407-8.

"Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the Legislature should be sustained."

Munn vs. Ill., 94 U. S., 123 (Waite).

3. That appellant, Pierce Oil Corporation, in the payment of such gasoline tax is not discriminated against within the meaning of Section 18 of Article 2 of the State Constitution because persons buy gasoline outside of the State for use on highways and avoid payment of the tax.

"The Act of March 26, 1901, authorizing cities of the first class to require residents thereof to pay a tax for the privilege of keeping and using vehicles within the city is not void as discriminating in favor of those who dwell outside of the city and use a vehicle therein."

Fort Smith vs. Scruggs, 70 Ark., 549 (Riddick).

A gasoline tax law of New Mexico, Chapter 93 of 1919, levied an excise tax of two cents per gallon upon the sale or use of gasoline and a license tax of $50.00

per annum upon distributors and $5.00 per annum upon retailers of gasoline. An attack was made upon the Act by the Continental Oil Company, Sinclair Refining Company and Texas Company, wherein the same contentions were made as in the case at bar. The cases were consolidated and the statute, though cut down as to the license tax of $50.00 applied to distributors and the two cents per gallon on shipments in original packages on the ground of interference with interstate commerce, was nevertheless sustained as to the two-cent tax upon retail sales of gasoline stored and dealt in within the State. And in construing the Act, the Supreme Court of the United States, speaking by Mr. Justice Day, said:

> "The plaintiffs state in the bills that their business in part consists in selling gasoline at retail in quantities to suit purchasers. A business of this sort, although the gasoline was brought into the State in interstate commerce, is properly taxable by the laws of the State.
>
> "Much is made of the fact that New Mexico does not produce gasoline, and all of it that is dealt in must be brought in from other States. But so long as there is no discrimination against the products of another State, and none is shown from the mere fact that the gasoline is produced in another State, the gasoline thus stored and dealt in is not beyond the taxing power of the State. Sales of the

class last mentioned would be subject to taxation within the legitimate power of the State."

Askren vs. Continental Oil Co., et al., 252 U. S., 444.

And in a further construction of said Act wherein the court held the act separable, and again sustained the constitutional portion thereof the Supreme Court, on June 6, 1921, speaking by Mr. Justice Pitney, said:

"A State may impose an excise tax upon the use of gasoline by a dealer at his distributing stations in the operation of his automobile, tank wagons, and trucks employed in the business of distributing his wares for sale, although the gasoline is the product of other States."

"The selection by the State of such a commodity as gasoline, as distinguished from other commodities, in order to impose an excise tax upon its sale and use, is not forbidden by the provisions of New Mexico Constitution, Article 8, Section 1, that 'taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class,' where the tax in question operates impartially upon all, and with territorial uniformity throughout the State."

"The excise tax imposed by New Mexico laws, 1919, Chapter 93, upon the sale and use of gasoline according to the number of gallons sold and used, does not, as applied to domestic sales and use, infringe rights of dealers in such product under the due process of law and equal protection clauses

of United States Constitution, Fourteenth Amendment."

Harry S. Bowman vs. Continental Oil Co., 256 U. S., 642.

The New Mexico tax, like the one at bar, was for creating a road fund; but unlike the Arkansas statute, it levied a tax both upon sales and upon all use of gasoline, thus assuming the dual nature of an excise and a privilege or license tax laid upon the dealer; and the same was sustained in its dual nature in so far as it applied to retail sales and use within the limits of the State, though objection was there strenuously posed and with more ground and reason than obtains here. And that under a constitution similar to ours as to taxation of tangible property. Surely Act 606 here complained of, which classifies a heavy and depleting use of the State's highways and lays upon such user a privilege tax for the maintenance of the highways, can and will be sustained when it applies only to purchasers within the State for such use and applies impartially to all such purchasers within the State, and lays the burden not upon the dealer, but upon those who get such privileged use of the State's highways, and does so under the terms within the State Constitutio nand not repugnant to the Federal Constitution.

Appellees suggest that the Act 606 here complained of was sustained in an exhaustive opinion rendered on April 10, 1922, by the Arkansas Supreme Court in a cause wherein Standard Oil Company of Louisiana and Gus Ottenheimer were appellants and R. B. Brodie et al. were appellees. The same attack and practically the same contentions were made in that case as are made in this case; and the Supreme Court of Arkansas by unanimous opinion affirmed the judgment of the Chancellor in holding 'Act 606, approved March 29, 1921, imposes not a property tax, but a privilege tax; and as such is not repugnant to either the Constitution of Arkansas or the Constitution of the United States.' And in such opinion the Supreme Court of Arkansas, speaking by its Chief Justice, used the following language quoted from the opinion:

> "The tax on the article used does not constitute a tax on the article itself, for the privilege is not on the article but upon the use of it upon the public highways. It is, in effect, the use of the public highway that is taxed and not the use of the article itself. * * *
>
> Our conclusion, therefore, is that under a fair interpretation of the Statute it imposes, not a property tax, but a tax upon the privilege of using automobiles upon the public highways. * * *

There is nothing in the provisions of the Constitution referred to which prohibits taxation for State purposes of the use of the public roads. While the public highways are for the common use of all, they belong to the public; and it is within the power of the Legislature either to regulate or to tax the privilege of using them. * * *

It is true that under the terms of the Statute, a motor car propelled otherwise than by the explosive type of engine escapes the taxation imposed by the Statute, and it must also be conceded that evasions of the law in the manner indicated in the argument of counsel are possible; but this does not render the Statute arbitrarily discriminatory in a legal sense. We have often said that complete uniformity in matters of taxation is unattainable, and it is not essential to the validity of a tax, either upon property or upon privilege, that it be absolutely free from inequality or discrimination. The lawmakers have some discretion, even in legislating with reference to the power of taxation as restricted by the terms of the Constitution, and they may determine the scope and extent of the exercise of the taxing power, and a mere incidental inequality or discrimination does not affect the validity of the Statute. * * *

The fact that there may be evasions of a taxation statute does not affect its validity, for all such statutes are open to evasions, if the general classification is not discriminatory, then mere incidental discriminations or opportunities for evasions do not affect its validity. * * *

The dealer is not required to pay the tax, but to collect it, keep and present an account thereof and pay it over to the County Treasurer. The

purpose of the Statute is two-fold, namely, to impose a tax upon the purchaser of gasoline for use of the car; and to regulate the business of the dealer by requiring him to collect the tax and pay it over to the County Treasurer. It is certainly within the power of the Legislature to regulate the business of selling of gasoline; and it is not an unreasonable regulation, for it does not involve the payment of any fee nor the performance of any unreasonable task. The dealer has ample opportunity to reimburse himself in advance by the collection of the tax before the commodity is delivered; and he has the power to compel obedience to the law by refusing to sell gasoline unless the tax is paid, and the dealer may adopt reasonable means of ascertraining the real purpose of the purchaser of the article. Of course, there may be evasions and it can not always be definitely ascertained what the purpose of the purchaser of gasoline is, so as to determine whether or not he is attempting to evade the law; but these inherent defects in all such statutes do not affect their validity. The presumption must be indulged that the vast majority of people who purchase gasoline for use in motor vehicles will obey the law rather than attempt to evade it; and the fact that the few may evade the law does not afford reasons for striking it down. There is scarcely a tax law on the statute books of this or any other State that is not evaded in exceptional instances. * * *

Finally, it is argued that the law is vague and uncertain—in so much that it is incapable of enforcement. The interpretation which we have given to the Statute, and which, we think, is a fair and reasonable one, relieves it from the charge of uncertainty, for we think that it means what we

have stated in this opinion, and that it can be readily understood. * * *

Our conclusion, therefore, upon the whole case is that the Statute is valid; and the decree is, therefore, affirmed."
153 Ark., 114.

The latter decision is cited as meeting and disposing of appellant's contention in this case that Act 606 contravenes the Constitution of Arkansas.

This decision, we apprehend, under holdings announced in Oaks vs. Mayo, 165 U. S., 363; Mer. Mfr. Bank vs. Penn., 167 U. S., 461; Williams vs. Eggleston, 170 U. S., 311; St. L. SW. Ry. vs. Arkansas, 235 U. S., 350; and many other decisions of the U. S. Supreme Court become conclusive on this court as to all questions of repugnance to the State Constitution; and leaves only the alleged repugnance to the Federal Constitution for court's consideration under this appeal. And for the sake of brevity I shall address myself only to the federal questions involved, ignoring all contentions of repugnance to the State Constitution as settled by the recent decision of the Arkansas Supreme Court.

This leaves only the following assignments by appellant to which we shall now address our argument:

a. That the Act deprives appellant of its property without due process.

b. That it makes appellant civilly liable for the debt of another without his consent.

c. That it makes appellant criminally liable for the act of another in which he does not participate.

d. And the Act is void for uncertainty.

To eliminate and simplify contentions it is conceded:

That the tax is laid upon the purchaser who uses upon the highways; and the burden of collecting, reporting and paying over the tax is laid on the vendor.

That purchasers who pay the tax are privileged to use the highways; and vendors who collect, report and pay over the tax are privileged to sell gasoline for use on the highways.

But appellant argues that the right to sell gasoline is natural and cannot be taken away or declared a privilege; and granting this contention for the sake of argument, we reply that the act nowhere denies the right to sell gasoline—it only requires that the designated use of the highways shall be taxed and that tax be measured by the gasoline consumed in the use; and,

as a matter of police regulation and convenience to the State, requires the vendor to collect same at the time of sale, report and pay over as prescribed.

Due process as used in the Federal Constitution is simply an opportunity to be heard in a tribunal of competent jurisdiction and upon equal terms or footing with all others and procedings in court are not always essential; and that is due process which affords to all a hearing and under the same restrictions and without discrimination. The due process clause of the Federal Constitution does not prevent a State from adjusting its taxing system; "and a citizen or corporation of another state receives the equal protection of the laws of a State when the State law is impartially administered with its benefits and obligations in a matter which is in the State's control." Ballard vs. Hunter (Ark. case), 204 U. S., 241; 95 U. S., 714; 110 U. S., 516; 134 U. S., 232; 113 U. S., 703; 101 U. S., 22; 160 U. S., 452; 115 U. S., 321; 231 U. S., 373 and 120; and many other cases cited in our brief (24-31).

We submit that even if appellant be deprived of its property under the Act as alleged there is not lack of due process, because the act provides the filing of a report of sales by all vendors and an accounting to officers recognized by law, and it applies without discrimination

to all vendors—individual and corporate, domestic and foreign; and any action civil or criminal is on relation of an officer of the State, in the name of the State, and in established courts of the State.

The argument that appellant is held civilly for the debt of another does not logically obtain because under the act, 'tis a vendor's duty to collect the tax along with sales price of the gasoline; and if he does so there can be no debt of the purchaser for which appellant is held under the Act. It is objected by appellant that it sells gasoline for other uses and cannot know at time of the sale to what use the product is to be applied; but we answer that every business agency, private and corporate, of necessity and right adopts reasonable and necessary rules for the conduct of its business subject to regulation of the law, and such reasonable rules and regulations of business have for time out of mind been recognized and approved by the courts in administration of the law. And appellant in the sale of gasoline under the terms of this Act is not only privileged but is expected to formulate and adopt such reasonable rules as necessary to protect itself in collecting, reporting and accounting on gasoline sales. This is the system enforced by the Federal Government in enforcing the tax

on soft drinks, theater tickets, stamp taxes, etc., and is often employed by the States in regulating the sales of medicines, narcotics, poisons, etc. We are impressed that appellant and all vendors should require applicants for gasoline and similar products to sign a declaration of a tax-free use before sale without collection of the tax; and should the applicant decline to sign such a declaration the vendor should decline to let him have the product unless the tax is paid; and that the courts in the administration of the law would protect the vendor under the rule not only as to tax measured by gasoline fraudulently obtained but as to any action by an applicant to whom gasoline was thus denied under the rule. And it is certain that a vendor in his dealings with the public under a reasonable and necessary rule for his protection under this act could not be held for tax as measured by gasoline obtained on a false declaration of use—much less could a vendor be held to answer criminally unless it be shown that the vendor participated or connived in such fraud.

It is argued by the appellant that the Act is vague and indefinite in its provisions in that appellant cannot know how to conform thereto; and it is urged that the trial court erred in not holding the Act void for uncertainty. And in reply we suggest that gasoline is not

taxed; but the use of it in propelling motor vehicles of combustible type engines upon the highways is taxed and such tax is guaged or measured by the gasoline or other products so consumed and in this provision there is nothing indefinite or uncertain.

The rate is definite and certain in the sum of one cent (1c) per gallon so consumed on the highways.

The purchaser who makes such use must pay the tax and at the time of the purcase.

The vendor must collect the tax at the time of the sale, report and pay over same to the proper officers; and we submit that the Act is definite and certain in its essential provisions.

As a sovereign the State may exercise her taxing power without restriction or limitation except as expressed in her constitution and the Federal Constitution. That this Act is within the limitations of the State Constitution has been decided by her own courts; and that decision is conclusive on this court as to the State Constitution.

The only question remaining for consideration and judgment of this court is the allegation that the Act contravenes the Fourteenth Amendment to the Federal Constitution; and this can be only by denial of due pro-

cess, by discrimination or by extending such taxing power beyond her borders.

There can be no lack of due process, because equal opportunity is given to all affected by its terms for a hearing in a court of competent jurisdiction for resisting and litigating the tax.

The tax is not extra-territorial, because it carries no attempt to tax any save those who make use of the highways with motor vehicles.

The Act is not open to the charge of discrimination because the tax is laid upon all who use gas propelled motor vehicles upon the highways. It applies to persons of that class within the borders of the State. And the Act meets every requirement under the Federal Constitution as determined by the U. S. Supreme Court in 240 U. S., 184; 165 U. S., 150; 115 U. S., 321; 179 U. S., 95; 196 U. S., 274; 134 U. S., 232, and many cases cited in our brief (39 to 42).

But appelant, in its brief, complains that the Act levies a tax upon the purchaser of gasoline for privilege of using the highways and a tax upon the vendor for privilege of selling gasoline; and argues that this makes the Act void; but we reply that even if this complaint were true as made, the argument deduced therefrom is

not well founded, and is not supported by the cases cited. But even if the objection and argument of apellant obtained in this regard the contention is settled against in a recent decision of the U. S. Supreme Court in Askren vs. Continental Oil Co., et al., 252 U. S., 444, sustaining a gasoline tax law which levied a tax upon all use of gasoline and a dealer's tax upon vendors of gasoline for road purposes.

Finally, it is urged by appellant that the Act must fall and be cut down because to comply with the terms of the Act will involve some expense to the appellant in the collecting, reporting, and accounting for the tax. It is now urged that such expense will approximate $600.00 per month; and though this sum was conceded for the purpose of making the record in this case, we are impressed that such expense can and will be materially reduced by the appellant on adjustment of its business to the terms of the Act.

However, we accept the record as it is written and make reply that no greater burden and expense is laid upon the vendor in the regulation of its business than is necessary in the administration of the taxing act; and we submit that unless appellant shows the burden and expense laid upon it or that some part thereof is arbitrary and unnecessary its objection can have no legal

standing. Because the State as a sovereign may exercise her police power in imposing upon individuals, and corporations such reasonable rules and regulations as are necessary in administration of her laws and adjustment of her taxing systems; and such power goes hand in hand with the taxing power, and like the taxing pawer, it extends to all things not prohibited by the Constitution.

Such power is reserved to the States and the Fourteenth Amendment was never intended to cripple or hamper the States in their taxing methods; and it does not do so unless such systems as devised violate the due process clause. 204 U. S., 320; 312 U. S., 138; 217 U. S., 114, and cases in brief (5 and 6).

In the case of Dobbins vs. Los Angeles, 195 U. S., 223, was involved the police power and we suggest that an analysis of this case shows that it involved the absolute denial of a vested constitutional right. In response to a municipal ordinance of Los Angeles fixing the area or limits within which gas manufacture might be conducted, Dobbins had procured a permit for such gas manufacture, acquired a lot and made valuable improvements thereon; and thereafter at the instigation of a competitor the city council amended the ordinance as to nullify the permit and place without the permitted

area the gas plant of Dobbins—thus denying his rights under the permit and virtually confiscating his property. In an action to enjoin enforcement of the amended ordinance the U. S. Supreme Court sustained Dobbins and in reasoning to a decision in the case, the court restricted the police power invoked by the amended ordinance, as a violation of the due process clause of the Fourteenth Amendment. The court was careful to recognize a delegation of the police power to the city of Los Angeles by the State in whom the power was inherent; but they found the exercise or application of same in this case as arbitrary, discriminatory and oppressive and to that extent in violation of the due process clause in depriving of property and right without a hearing or just compensation. The principles announced by the court in that case were sound law then and are sound law now; but while principles remain the same in the abstract, their governing or controlling force depends upon the facts to which they are applied.

There a lawful right to a lawful business had vested in pursuance of a lawful permit under a valid ordinance; and such right was denied and property value destroyed by an amended ordinance held by the Supreme Court as void for denial of due process.

There a regulation of business was not sought; but a denial of property and right to do a lawful business was involved. In the case at bar the right to sell gasoline is nowhere denied, nor is it sought to be restricted, only such regulation of the business is sought as is necessary to administer an important revenue law.

In further objection the appelant complains that the Act deprives the vendor of the right to make contracts and insists that selling gasoline is a lawful business.

It is conceded that the sale of gasoline is a lawful business; and we reply that all lawful business is subject to reasonable regulation and control under police power inherent in the States. We go further and suggest that under her police power the State does and should suppress all unlawful business.

It is on this principle that criminal laws for protection of health, morals, peace and comfort of society are enacted and enforced. And we go still further and assert that not only may a lawful business be reasonably regulated but all lawful business may be taxed so long as the taxation is not arbitrary, discriminatory or extra-territorial.

Appellant further complains that the Act deprives of the right to sell gasoline on a credit without incurring liability for the tax; and this is conceded by the State, because the Act enjoins upon the vendor the collection of the tax at time of sale. But to this objection we reply that a vendor who credits a purchaser for gasoline at twenty-five cents per gallon as purchase price will not not likely object to crediting for the aditional one-cent tax. And for this reason we regard the objection as more technical than meritorious. However that may be, the fact remains that the Supreme Court of the United States in construing a Gasoline Tax law of New Mexico in 1920 held "that it is within the power of the State to tax gasoline sales at the rate of two cents per gallon, notwithstanding a vendor's natural right to sell on credit. Askren-Attorney General vs. Continental, Sinclair and Texas Oil Companies, 252 U. S., 444; Bowman vs. Continental Oil Co., 256 U. S., 642; Texas Co., vs. Brown, 258 U. S., 466.

We respectfully submit the complaint of appellant is without equity; and the judgment of the United States Circuit Court of Appeals herein should be affirmed.

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Mr. William T. Hammock, Assistant Attorney General, with whom *Mr. J. S. Utley*, Attorney General, *Mr. John L. Carter*, *Miss Darden Moose* and *Mr. J. S. Abercrombie*, Assistant Attorneys General, of the State of Arkansas, were on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

A statute of Arkansas provides that one who sells gasoline to be used by the purchaser in motor vehicles on highways of the State "shall collect from such purchaser, in addition to the usual charge therefor, the sum of one cent (1¢) per gallon for each gallon so sold;" that the dealer shall register with the county clerk in every county in which he does business; shall file each month a report of the sales made within the county during the preceding month; shall personally pay over each month the amount of the taxes accrued thereon; and that failure to file the report or to pay such amount is a misdemeanor which subjects the dealer to a fine. Act No. 606, March 29, 1921, Acts of Arkansas, 1921, p. 685. To enjoin the enforcement of the law the Pierce Oil Corporation brought, in the federal court for Western Arkansas, this suit against taxing officials. The trial court dismissed the bill, without opinion. Its decree was affirmed by the Circuit Court of Appeals. 282 Fed 253. The case is here under § 241 of the Judicial Code. Whether the statute is valid is the sole question for decision. The claims are that the statute violates the due process clause of the Federal Constitution; and that it is void for uncertainty.[1]

[1] In the District Court the plaintiff challenged the validity of the law also under the state constitution. But after the appeal was taken, the statute was upheld by the highest court of the State in *Standard Oil* v. *Brodie*, 153 Ark. 114. So that question is not before us. In this Court, it was argued that the statute violates the equal protection clause. As the contention was not made below, it is not considered. That the remedy at law was not adequate is conceded.

The claim that the act violates the due process clause rests upon the argument that the tax levied is a privilege tax for the use of the highways by the purchasers; that the seller is required to pay the tax laid on the purchasers; that, unlike those cases where a bank is required to pay taxes assessed against stockholders or depositors, *Citizens National Bank* v. *Kentucky*, 217 U. S. 443; *Clement National Bank* v. *Vermont*, 231 U. S. 120, the seller is not afforded the means of reimbursing himself; and that, moreover, the mere process of collecting the tax from the purchaser, and making monthly reports and payments, subjects the seller to an appreciable expense. A short answer to this argument is that the seller is directed to collect the tax from the purchaser when he makes the sale; and that a State which has, under its constitution, power to regulate the business of selling gasoline (and doubtless, also, the power to tax the privilege of carrying on that business) is not prevented by the due process clause from imposing the incidental burden.

The claim that the law is void for uncertainty is not urged as a violation of the due process clause. Compare *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Fox* v. *Washington*, 236 U. S. 273. The argument, that there inheres in the statute such uncertainty as to render it a nullity, is answered by the fact that, since the judgment was entered in the trial court, all uncertainty has been removed by the decision of the highest court of the State in *Standard Oil Co.* v. *Brodie*, 153 Ark. 114. There the act was construed as requiring sellers to collect and pay the tax only on such gasoline as they have reason to believe purchasers from them will use in motors on the highways.

Affirmed.

PIERCE OIL CORPORATION *v.* HOPKINS, COUNTY CLERK OF SEBASTIAN COUNTY, ARKANSAS, ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 151. Argued January 11, 1924.—Decided February 18, 1924.

A state law requiring retailers of gasoline to collect from purchasers a tax of 1¢ per gallon upon such gasoline sold by them as they have reason to believe the purchasers will use in motors on the highways of the State, and requiring the retailers to register, and to report and pay over each month the taxes accruing on sales made, under penalty of a fine, *held*, not violative of the retailers' rights under the due process clause of the Fourteenth Amendment. P. 139.

282 Fed. 253, affirmed.

APPEAL from a decree of the Circuit Court of Appeals, which affirmed a decree of the District Court dismissing the bill in a suit to enjoin enforcement of an Arkansas law taxing gasoline.

Mr. Sam T. Poe, with whom *Mr. Tom Poe* and *Mr. Louis Tarlowski* were on the brief, for appellant.